83-368

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES A. RUSSO,
VINCENT MELI, and
ROBY G. SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LUSTIG & LUSTIG, P.C.
BY: NORMAN L. ZEMKE (P22713),
Of Counsel
Attorneys for Petitioner, Russo
25130 Southfield Rd., Ste. 102
Southfield, Michigan 48075
Phone: (313) 557-6665

IRVING KROLL (P16255)
Attorney for Petitioners, Meli and Smith
26555 Evergreen Rd., Ste. 701
Southfield, Michigan 48076
Phone: (313) 352-4000

RENAISSANCE PRINTING, INC., 76 WEST ADAMS
8TH FLOOR, DETROIT, MICHIGAN 48226 (313) 964-3185

QUESTION PRESENTED FOR REVIEW

I.

DOES THE USE OF ECONOMIC THREATS BY MANAGEMENT DURING LABOR NEGOTIATIONS WITH ITS EMPLOYEES TO OBTAIN CONCESSIONS, IN RESPONSE TO EMPLOYEES' THREATS TO ILLEGALLY STRIKE, CONSTITUTE EXTORTION UNDER THE HOBBS ACT (18 USC §1951)?

LIST OF PARTIES

The parties in this proceeding in the United States Court of Appeals were as follows:

1. James A. Russo, Defendant-Appellant.
2. Vincent Meli, Defendant-Appellant.
3. Roby G. Smith, Defendant-Appellant
4. United States of America, Plaintiff-Appellee

TABLE OF CONTENTS

INDEX OF AUTHORITIES

No.

In the Supreme Court of the United States

AUGUST TERM, 1983

JAMES A. RUSSO,
VINCENT MELI, and
ROBY G. SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, James A. Russo, by his attorney, Norman L. Zemke, Vincent Meli, by his attorney, Irving Kroll, and Roby G. Smith, by his attorney, Irving Kroll, pray that a Writ of Certiorari issue to review the Judgment heretofore entered against them by the United States Court of Appeals for the Sixth Circuit filed on May 20, 1983 and further denied a Petition for rehearing en banc on July 25, 1983.

OPINIONS AND ORDERS BELOW

The Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth in Appendix G herein. The Opinions of District Judges Lawrence Gubow and Patricia Boyle, with respect to Petitioners' Pre-Trial Motions are unreported, but are set forth in Appendix F herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 708 F.2d 209 (6th Cir. 1983), and is set forth in Appendix B herein. The Order denying Petitioner's Motion for a Hearing En Banc is set forth in Appendix C herein. The Order of the Sixth Circuit Court of Appeals Staying the Mandate is set forth in Appendix D herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 20, 1983. An Order denying a Petition for Rehearing En Banc was entered on July 25, 1983 by the United States Court of Appeals for the Sixth Circuit. The time for filing a Petition for Writ of Certiorari continues to September 25, 1983. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

STATEMENT OF THE CASE

The J & J Cartage Company was engaged in the hauling of raw steel from the Detroit waterfront to plants and warehouses in the Detroit Metropolitan area. It was formed by Joseph Cusmano, its President, who was joined in approximately 1963 by James Russo. Cusmano and Russo each

became fifty (50%) percent shareholders when the company was incorporated.

The two shareholders divided the duties of running the Company. Cusmano ran the office, was in charge of the purchasing, and made various decisions concerning labor decisions with the drivers. Russo controlled the affairs of the Company outside, that is, assisting the drivers with problems encountered while picking up or delivering the steel, as well as with personal problems. Meli was hired in April, 1972, as a salesman for the Company.

On April 6, 1977, a Federal Grand Jury sitting in the Eastern District of Michigan, indicted James A. Russo, Vincent Meli, Roby G. Smith and Joseph D. Cusmano, in a two Count indictment charging violations of the Hobbs Act (18 U.S.C. §1951). Count I of the indictment was for Conspiracy to Violate the Hobbs Act by Extortion and the coercion of the employee truck drivers to pay the employer's required union contract contributions to the union's Health, Welfare and Pension Funds by threats of *economic loss*; specifically the assignment of unprofitable loads; loss of their jobs; or loss of equity in their equipment, in "an attempt to increase the employer's share of the profits from the operation of the Company". The indictment further alleged that as part of the conspiracy, the truck drivers were forced to sign a supplementary agreement to the basic union contract which authorized J & J Cartage to deduct eleven (11%) percent from the driver's gross earnings, prior to the computation of wages, and that this eleven (11%) percent deduction would be used for the employer contributions to the union Pension and Welfare Fund. These employer contributions had originally been contracted for between the Company and the drivers through the Central States Area Local Cartage Supplemental Agreement and the Local Cartage Steel Rider previously agreed upon.

Count II of the indictment charged the same conduct as substantive Hobbs Act violations.

The case was assigned to the late Judge Lawrence Gubow of the Eastern District of Michigan, who denied the Defendants' pre-trial Motions to Dismiss the Indictment, which motions asserted that the Hobbs Act cannot apply to labor negotiations and especially not to economic threats arising out of labor negotiations concerning management and labor. (Opinion dated July 18, 1977; adopted by Judge Boyle, April 24, 1979; see at Appendix F). Defendant Cusmano's Motion to Sever was granted by the Honorable Lawrence Gubow because of antagonistic defenses, but all other Motions to Sever were denied and the Defendants proceeded to trial. (Opinion dated July 18, 1977).

The Government elected to proceed to trial against Cusmano first. Trial verdicts of guilty on both Counts were had on November 5, 1977. The conviction was later reversed by the United States Court of Appeals for the Sixth Circuit on the grounds that the indictment was constructively amended at trial. *United States* v *Cusmano*, 659 F 2d 714 (6th Cir. 1981). A separate jury trial of the defendants, Russo, Meli, and Smith was begun but was later terminated by mistrial after approximately seven (7) weeks when the trial judge unfortunately passed away. The case was reassigned to the Honorable Patricia J. Boyle on October 23, 1978, who, upon rehearing the pre-trial Motion to Dismiss the Indictment, denied same. (Opinion dated April 24, 1979).

On May 15, 1979, the second trial began and the evidence showed that J. & J. Cartage was subject to a Collective Bargaining Agreement with Local 299 of the International Brotherhood of Teamsters including, inter alia, the National Master Freight Agreement, and the Local Cartage Steel Rider. However, the employee-drivers did not believe that the Company was following these agreements. In the fall of 1972, they

(the drivers), organized a Grievance Committee which compiled a list of grievances, to include some demands not covered by the National Master Freight Agreement and the local Cartage Steel Rider (i.e. guaranteed annual wages). A strike, or work stoppage, was threatened for November 22, 1972, if the demands presented by the "manifesto" were not met.

The grievances were apparently presented at the union hall to a union Business Agent. Cusmano, however, upon receipt of the demands, informed the author of the grievance list that he (Cusmano) could deal directly with the employees to work the problems out, that there was no need to contact the union, and that he could not afford to pay the drivers' demands.

The Company attempted to resolve those grievances by calling a meeting of the drivers and proposing a new wage agreement whereby the amount of the gross payments received by the Cartage Company for each load hauled by a driver would be reduced by fifteen (15%) percent, prior to any division of the money between the Company and the drivers, in order to cover the Company's cost of meeting its contractual obligations. This meeting (November 26, 1972) was chaired by Meli and one Colonel Penniman, since deceased. When the drivers refused to agree to this reduction in their compensation, a second attempt was made by the Company to resolve the dispute. At a subsequent meeting in Marcy of 1973, again chaired by Meli and Penniman, the Company proposed that the earnings of each driver would be reduced by the declaration of an eleven (11%) percent "service charge" from the gross amount available for distribution between the Company and the driver in return for which the Company would meet its obligations as demanded by the employees "manifesto", which had threatened an illegal strike. This proposed reduction of compensation was also overwhelmingly rejected by the drivers.

Having failed in their efforts to settle the differences during the meetings between labor and management, the Company's President, Joseph Cusmano, called each of the drivers individually into his office and through his promises and alleged threats of economic loss, obtained their signatures on a Supplementary Agreement which changed the wage agreement previously agreed upon with the union, by reducing the drivers' compensation through deduction of the eleven (11%) percent from the gross amount available for distribution between the Company and the drivers.

Following the signing of the Agreement, in May of 1973, the eleven (11%) percent of gross earnings began to be deducted from each driver-owner. The eleven (11%) percent deduction ceased to be deducted in April of 1974. This was apparently in response to pressure from other management personnel of Cusmano, the drivers, and a series of local newspaper articles on the steel cartage business.

Following the trial, all three Petitioners were convicted of both Counts and were sentenced to three (3) year concurring terms on each Count along with substantial fines.

On May 20, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the convictions on each Count, with a "reluctant" concurring opinion by the Honorable John D. Holschuh, U.S. District Judge for the Southern District of Ohio, sitting by designation, whose opinion is consistent with the legal position taken by these Defendant-Appellants on the legal issue raised herein. (*Russo*, supra at 221-226; Appendix B) A Petition for Rehearing En Banc was denied and the Petition for Rehearing was denied with a dissent noted, again by the Honorable John D. Holschuh. (Appendix C)

REASONS FOR ALLOWANCE OF THE WRIT

THE COURT OF APPEALS ERRONEOUSLY DECIDED A FEDERAL QUESTION WHICH IS IN CONFLICT WITH THE LEGISLATIVE HISTORY AND *U.S.* v *ENMONS* 410 U.S. 396 (1972) IN THAT FOR THE FIRST TIME IN THE ANNALS OF UNITED STATES JURISPRUDENCE, A COURT HAS HELD THAT THREATS OF ECONOMIC LOSS *BY MANAGEMENT* TO ITS EMPLOYEES DURING LABOR NEGOTIATIONS WAS "EXTORTION" IN VIOLATION OF THE HOBBS ACT (18 USC 1951). (EMPHASIS ADDED)

It is the Appellants' contention that the United States Court of Appeals for the Sixth Circuit erred when it held that the Hobbs Act (18 USC 1951), a Federal criminal statute, with the possible imposition of severe sanctions upon conviction, applied to the fact pattern as alleged in the indictment of the Appellants. In Labor's continuing struggle for higher wages and better working conditions, and Management's contrary position to minimize labor costs so as to increase "profits", the use of threats of economic loss during labor negotiations are commonplace. Employees threaten to shut down an employer by use of strike, and employers, in today's economy, have threatened to shut down their plants, if employees do not agree to reduce their wages.

In the case at bar, the prosecution's entire case was grounded on the allegation in the indictment that the defendants, "by *threats of economic* loss . . . did force the drivers . . . to pay the Company employer's contribution to the Fund with their consent induced by the wrongful use of force and fear, in that the Defendants *did threaten certain drivers of the Company with unprofitable truckloads, the loss of their jobs, and loss of equity in their equipment*, unless they agreed to the deduction from their weekly gross earnings." (Emphasis added.)(Appendix E)

The indictment also claimed that the conspiracy consisted of the following:

"(a) *To increase the employer's share of the profits* from the operation of the Company by forcing the drivers to pay the Company employees' . . . contributions to the Fund."

"(b) Defendants *conducted meetings with the drivers* . . . in an attempt to obtain their consent for the Company to deduct the eleven (11%) per cent . . ."

"(c) Defendants did *contact and confront* the drivers . . . *and caused them to sign an agreement* . . . to authorize the Company to compute their wages . . . by deducting a service change of eleven (11%) per cent from their gross earnings."

"(d) That the Business Agent Defendant (Roby Smith) signed the Agreement well knowing that it was not in *their* (the drivers) *best interest*." (Emphasis added)

Thus, for the first time in the history of United States Jurisprudence, an attempt was made here to indict and convict management who, when faced with an economic threat from its employees to strike if their demands were not met, entered into direct bargaining negotiations with its employees to stop a strike.

A prior decision of this Court, *United States* v *Enmons* 410 U.S. 396, 93 S. Ct. 1007 (1972), construed the applicability of the Hobbs Act in labor-management cases. In *Enmons*, the facts involve, much as they do in the present case, a labor dispute between an employer and his employees over the terms and conditions of employment. In *Enmons*, employees of Gulf States Utility Company went on strike and were seeking a new Collective Bargaining Agreement. The defendants, members and officials of the employees' labor union, were indicted under the Hobbs Act for using violence, the damaging of the

Company's transformers and blowing up a sub-station owned by the Company, in order to force the Company to pay higher wages to the employees through a new Agreement. This court, in making its decision that the facts in *Enmons* did not constitute a violation of the Hobbs Act, relied upon the legislative history as well as upon the specific language of the Act, which indicated to the Court that Congress' intention to restrict the scope of the Hobbs Act in labor disputes was clear.

In *Enmons*, the Court analyzed the language of the Hobbs Act and the meaning of the term "wrongful" as used in the Act. The term "wrongful", in the words of this Court, "Limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." 410 U.S. at 400. The Supreme Court held that the term "wrongful" did not refer to the *means* employed to obtain the property; those means proscribed by the statute are always wrongful. Instead, the Court concluded that the term "wrongful" must apply to the *objective* of the defendants, and the Court held that only where the alleged extortionists had no lawful claim to the property obtained would the obtaining of the property be wrongful. Thus, the Court held that because the objective of the union employees, that of obtaining higher wages in return for genuine services, was a legitimate union objective, the Hobbs Act was held to have no application to the defendants. This was despite the fact that the means used to achieve that objective were clearly wrongful.

In support of its decision, the Court concluded:

"1. The absence of any prior case in which the Hobbs Act had been applied to the fact pattern in *Enmons*;

2. The fact that the Hobbs Act is a criminal statute and must therefore be strictly construed, with any ambiguity being resolved in favor of lenity; and

3. The fact that nothing in the Act's history or its language could justify "the conclusion that Congress intended to work such an extraordinary change in Federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." 410 U.S. at 411.

In applying the logic of the *Enmons* decision to the case at bar, the Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation in the Sixth Circuit, wrote a "reluctant" concurring opinion which sets forth the legislative background of the Hobbs Act as it applies to management-labor disputes. (See *Russo* at 216-226; Appendix B).

Judge Holschuh went on to say that management in the present case had a "legitimate" management objective in their seeking of a reduction of labor costs by a mid-term modification of the Collective Bargaining Agreement. He concluded that the objective of J&J Cartage, in this case, to obtain a reduction of the driver's compensation in order to offset the Company's costs of its contributions to the Health, Welfare and Pension Fund plans is "a legitimate management objective." Even conceding that the Company's efforts in the present case have the effect of shifting the responsibility for the Fund payments of the employees and constituted a patent violation of the Collective Bargaining Agreement, the "objective" in the context of the *Enmons* case was legitimate, and neither a resulting breach of contract or the parties' own characterization of such a breach as "unlawful" or "illegal" changes a legitimate management objective into an illegitimate one. (see *United States* v *Russo*, supra, footnote 13 at 223; Appendix B).

If this Court permits the lower court Opinion to stand, then management in this country can be convicted of being in a criminal conspiracy to violate the Hobbs Act if, as charged in the indictment, it sought to *"increase the employer's share of the profits from the operation of the Company* by forcing the drivers (sic by

economic threats) to pay the Company employees' . . . contributions to the Fund." (See Indictment, Paragraph 7, Count I; Appendix E).

Aren't profits a legitimate objective of management? If not, then the entire free enterprise system of economics as practiced in our country is now in serious danger of being obliterated. Before wages and benefits are paid by an employer, the funds that are paid to those employees legitimately belong to the employer. Can anyone envision a Collective Bargaining session between an employee and an employer without threats flying across the table? To accept the indictment as a violation of the Hobbs Act would legitimize the Government's allegation that the words, "increased . . . profits" are an illegitimate goal of management. It is respectfully submitted that this Honorable Court should in deference not only to these defendants, but to the entire American business community, reject this proposed, unique and dangerous concept of law, or else every businessman in this Country could find himself accused of extortion in violation of the Hobbs Act after any union bargaining session.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge that the Petition for Writ of Certiorari be granted, or in the alternative, that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioners' convictions be summarily reversed.

Respectfully submitted,

LUSTIG & LUSTIG, P.C.
By: /s/ NORMAN L. ZEMKE
(P22713), *Of Counsel*
Attorneys for Petitioner, Russo
25130 Southfield Rd., Ste. 102
Southfield, Michigan 48075
Phone: (313) 557-6665

By: /s/ IRVING KROLL (P16255)
Attorney for Petitioners, Meli and Smith
26555 Evergreen Rd., Ste. 701
Southfield, Michigan 48076
Phone: (313) 352-4000

APPENDICES

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the

same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES A. RUSSO; VINCENT MELI; ROBY G. SMITH,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May 20, 1983

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Judge; and HOLSCHUH,* District Judge.

BROWN, Senior Judge, delivered the opinion of the court. MARTIN, Circuit Judge (p. 14) filed a separate but concurring opinion. HOLSCHUH, District Judge, (pp. 15-35) filed a separate opinion, concurring only in the result.

BAILEY BROWN, Senior Judge. Appellants, James A. Russo, Vincent Meli, and Roby Smith, were charged in a two-count indictment with conspiracy to violate and a

---

* The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

substantive violation of the Hobbs Act, 18 U.S.C. §1951.[1] The indictment charged that the appellants, who were an officer and an employee of J&J Cartage Company and a union local business agent, conspired to and did in fact obstruct, delay and affect interstate commerce by threatening employees of the Company with economic loss and thereby forced them to pay J&J Cartage Company's contributions to a union pension and welfare fund.[2]

---

[1] The Hobbs Act provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> • • •
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

[2] Count One of the indictment stated, in pertinent part:

> • • •
>
> 2. At all times pertinent hereto, the Company was contractually bound by the terms of the National Master Freight Agreement, Central States Area Local Cartage Supplemental Agreement and certain supplemental agreements thereto with the International Brotherhood of Teamsters, ... and was required to pay certain employer contributions to the Central States Southeast and Southwest

(footnotes continued on next page)

Appellants were convicted on both counts and have appealed, claiming numerous errors. We overrule appellants' claims and affirm their convictions.

BACKGROUND

The J&J Cartage Company was a corporation engaged in the business of hauling raw steel from the Detroit waterfront to plants and warehouses in the metropolitan Detroit area. Appellant James Russo, along with Joseph Cusmano,[3] was

---

(footnotes continued from previous page)

> Health, Welfare and Pension Funds, including the Michigan Conference Health and Welfare Fund . . .
>
> • • •
>
> 6. That commencing on or about the 18th day of November, 1972, and continuously thereafter up to on or about the 10th day of April, 1974, . . . VINCENT A. MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO, and ROBY G. SMITH, . . . did knowingly and willfully conspire, combine, confederate and agree together, and with each other . . . to obstruct, delay and affect interstate commerce . . . and did attempt to do so by extortion, to wit: by threats of economic loss, that is to say, the defendants did force the drivers who were employees, agents, and owner-operators of the Company to pay the Company employer contributions to the Funds with their consent induced by the wrongful use of force and fear, in that the defendants did threaten certain drivers of the Company with unprofitable truck loads, the loss of their jobs, and the loss of equity in their equipment unless they agreed to the deduction from their weekly gross earnings.

Count Two of the indictment alleged the same conduct as the conspiracy offense, but as a substantive offense.

[3] Joseph Cusmano, the founder and half owner of J&J, along with appellant James Russo, was also named as a defendant. Cusmano was tried separately and convicted on both counts of the indictment. This court, in a 2-1 decision, reversed his conviction on appeal. *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981), discussed more fully *infra*.

part owner of the Company, holding fifty percent of the stock. Appellant Vincent Meli was an employee of the Company, employed both as a public relations person and as a negotiator for the Company. Roby Smith was a business agent of Local 299 of the International Brotherhood of Teamsters, which, at the times pertinent to these proceedings, represented the Company's employees.

J&J Cartage Company employed approximately forty truck drivers to haul steel. The equipment used to haul the steel belonged in part to the Company and in part to the individual drivers. Some drivers owned both the tractor and trailer, some owned only the tractor, and some did not own either. Drivers who provided the equipment used to haul the steel were known as "owner-operators."

During the time of the conspiracy alleged in the indictment, the Company was party to collective bargaining agreements with Local 299 of the International Brotherhood of Teamsters, the bargaining representative of Company employees. The basic collective bargaining agreement for the trucking industry was the National Master Freight Agreement, which was supplemented regionally by both the Central States Area Local Cartage Supplemental Agreement and by a special rider known as the Local Cartage Steel Rider. Instead of minimum hourly rates of pay, as set forth in the National Master Freight Agreement, the Local Cartage Steel Rider established a system for paying drivers a percentage of the gross amount paid to the Company for the loads of steel actually hauled.

Specifically, Arcicle 2 of the Local Cartage Steel Rider provided that owner-operators were to be paid not less than 75% of the gross earnings, while drivers other than owner-operators were to receive no less than 60% of the gross. Articles 54 and 55 of the Central States Area Local Cartage Supplemental Agreement provided that the employer was to contribute to the Central States Southeast and Southwest Areas Health and Welfare Fund, as well as to the Pension Fund. Article 7 of the

Rider provided that: "It shall be unlawful and illegal for Health and Welfare and/or Pension payments to be deducted from Owner-Operator's gross earnings."

It is undisputed that sometime in 1972 some of the Company's drivers organized a grievance committee which prepared a list of the drivers' grievances. The drivers sought, among other things, to have the Company pay social security taxes and make contributions to the Teamster health and welfare and pension plans with respect to them, as expressly required under the collective bargaining agreement. The grievances were presented to both the Company and to appellant Roby Smith, the Teamster business agent assigned to represent the Company's drivers.

In an attempt to resolve some of the employees' grievances, the Company management called a general meeting of the drivers on November 26, 1972. Appellants Russo and Mel:, along with two other Company representatives, appeared on behalf of the Company. According to several of the drivers, the Company proposed that 15% of the gross earnings of each driver be deducted to cover the costs of the drivers' demands. This proposal was voted down. The November 26, 1972 meeting was adjourned with no agreement having been reached between management and the employees.

The Company called a second general meeting between management and the employees on March 25, 1973. At this time the Company presented a new proposal to the drivers: in return for an 11% "service charge" taken from the drivers' gross earnings, the Company would meet its obligations under the collective bargaining contract. The Company explained that, after deducting the 11% service charge, the amount available for division between the Company and a driver would equal 89% of the gross. The drivers overwhelmingly voted against the 11% proposal by a show of hands.

After the meeting of March 25, the Company's president, Joseph Cusmano, called each of the drivers individually into his office, and through promises, threats of economic loss, and misrepresentation, procured their signatures on a Supplementary Agreement providing for the 11% deduction discussed above. The agreement was later signed by appellant Roby Smith in his capacity as the representative of Local 299. This 11% "service charge" became effective on June 3, 1973, and continued in effect until on or about April 10, 1974.

There was testimony at trial that appellant Meli had a reputation as being a part of the Mafia, this being admitted in evidence to show the state of mind of the drivers when they agreed to the deduction of the "service charge." There was also evidence that appellant Smith failed to process grievances and acted in cooperation with the Company in approving this supplemental agreement that was contrary to and invalid under the collective bargaining agreement.

The first trial of appellants Meli, Russo, and Smith was declared, after several weeks, a mistrial due to the death of the trial judge, the Honorable Lawrence Gubow. The case was reassigned to the Honorable Patricia J. Boyle.

As stated, all three appellants were tried and convicted by a jury on both counts. The court sentenced each appellant to three years imprisonment for each count, to be served concurrently. Appellants Meli and Russo were fined $10,000.00 for each count of the indictment, while Smith was ordered to pay a fine of $5,000.00 for each count.

I

Appellants contend that there was, at trial, a constructive amendment of the indictment. They contend, and the Government agrees, that the indictment charges only an extortion by threats of economic loss and does not charge an extortion by threats of physical violence.[4] Appellants further contend that this constructive amendment was effected because of the admission of evidence that appellant Meli had a reputation as being connected with the Mafia, which could only connote physical violence, and because the charge allowed a finding of extortion by means of threats of physical violence.

As stated (n. 3 at p. 3), Cusmano's trial was severed, and he was tried separately prior to the trial of these appellants. There, the charge to the jury clearly allowed a finding of extortion by threat of physical violence as well as by threat of economic loss. Cusmano's conviction was reversed on the ground that the indictment was constructively amended at trial. As we read this court's opinion in Cusmano's case, the court did not hold that the admission of proof as to Meli's reputation of Mafia connections constructively amended the indictment; rather, it held the indictment was so amended because the charge to the jury at Cusmano's trial specifically allowed a finding by the jury of extortion by threats of physical violence as well as by threats of economic loss. After quoting from the charge to such effect, the opinion in *Cusmano* then states:

> We cannot know whether the grand jury would have included in its indictment an allegation of extortion through threats of physical violence. The admission of evidence of such extortion, together with the trial court's

---

[4] This was the holding of the majority in *United States* v. *Cusmano*, 659 F.2d 714, 715 (6th Cir. 1981).

> instructions, indicate that this might have been the basis of Cusmano's conviction. If so, he was convicted on charges the grand jury never made against him. This was fatal error. [citations omitted.]

659 F.2d at 719.

On the contrary, the charge in the instant case made clear that the alleged extortion to be considered by the jury was extortion by threats of economic loss. In this connection the court charged:

> Fear is a state of anxious concern, alarm or apprehension of anticipated harm. It does not necessarily refer to physical fear or fear of violence. It includes fear of economic loss. It exists if you find beyond a reasonable doubt that by threats of the defendant, fear of economic loss was created in the victim's mind, or that the defendants knowingly and willfully used the victim's fears of economic loss; and that under the circumstances it was reasonable for the victim to have such fear; and that the defendant made use of such fear to extort or attempt to extort money.
>
> The essence of the crime of extortion is a defendant's knowing and willful use of that fear, not its creation. The defendant need not have created the fear in the minds of the victims. It matters not that the fear may have already been present in the minds of the victims as a result of the victim's previous experience, or that the fear may have been created by people other than a defendant, or that the defendant may have created such fear.
>
> The law requires proof, beyond a reasonable doubt, that the fear was reasonable and actual, and that the defendant knew of and intentionally used that actual fear, because the law does not hold any man responsible for the unforeseeable or the unreasonable reactions of those with whom he speaks or deals.

But the law does prohibit the knowing and willful creation or instilling of fear, or the knowing and willful use of existing fear, when this is done with the specific purpose of inducing another to part with his property.

In making your decision as to whether the fear of the employee drivers of J&J Cartage Company was reasonable, should you find such fear, you should use the standards you would use in making decisions in your everyday life.

You may consider the testimony of the state of mind of the alleged victim in determining whether such economic fear existed and whether such fear was reasonable. The testimony of an alleged victim as to what people other than a defendant had told him is admissible not for the truth of what was said but is admissible as to whether the hearing of such statements would have tended to produce a reasonable fear in the victim's mind. Such statements by people other than a defendant to a victim may, therefore, only be considered in determining the victim's state of mind, that is, whether there was fear on the part of the victim and whether the fear was reasonable.

App. 1085a *et seq.*

• • •

The mere deduction of the 11 percent, or the taking of $15.50, or the payment of health, welfare, and/or pension contributions, unaccompanied by fear of economic loss would not constitute extortion.

App. 10881 *et seq.*

• • •

The defendants are charged only with conspiracy to obstruct, delay and affect interstate commerce, and obstructing, delaying and affecting interstate commerce, by

forcing employees of J & J Cartage Company to pay health and welfare and pension contributions, which [*sic*] the consent of said employees induced by the wrongful use of fear and threat of economic loss from November 1972 up until and including April 10, 1974.

App. 1092a.

We therefore conclude that, different from *Cusmano*, there was no constructive amendment to the indictment.

II

Appellants also contended that it was error to admit evidence of Meli's reputation as being connected with the Mafia. This evidence was admitted solely for the purpose of showing the state of mind of some of the victims of the alleged extortion at the time that they consented to the 11% deduction, the proffered purpose of which was to enable the Company to make payments to the Teamster welfare and pension fund. The district judge had determined, as a result of a motion *in limine*, not to exclude such reputation evidence on the ground that reputation for being involved in the Mafia could only create a fear of physical violence. She concluded, we think correctly, that such reputation could also reasonably create a fear of an actual ability to inflict economic loss. As clearly set out in that part of the charge heretofore quoted, and in the next-quoted parts of the charge, proof of the Mafia reputation could be considered by the jury only to the extent that it created a fear of economic loss, and that such fear could be the basis of finding of extortion only if it was actual and reasonable and a defendant knew of and intentionally made use of such actual fear.

There have been instances during the course of this trial where references were made the Vincent Meli's alleged

affiliations with organized crime. These references were admitted into evidence for a very limited purpose, that is, to allow you to evaluate the state of mind of the witnesses. You are not here to determine, or even speculate on, who, if anyone, is an alleged affiliate of organized crime. You are only to determine if the defendant is guilty or not of the charges set forth in the indictment. Mr. Meli's reputation is not before you for an ultimate determination of fact.

App. 1093a-1094a.

* * *

To the extent that Mr. Meli's reputation may reasonably bear on the witness's state of mind, you may take it into consideration. So, as you were cautioned before, you must discipline yourselves to consider this evidence only for this ve' limited purpose.

App. 1094a.

We conclude that it was not error to admit evidence of Meli's Mafia reputation. In *United States* v. *Billingsley*, 474 F.2d 63 (6th Cir.), *cert. denied*, 414 U.S. 819 (1973), a prosecution under the Hobbs Act, it was held that the reputation of the defendant, a business agent for a union, was admissible to show the fear and the reasonableness of the fear of a contractor when the business agent threatened to shut down a job if the contractor did not hire some unneeded and unwanted iron workers. While, in the instant case, the district court could have excluded this reputation evidence, pursuant to Rule 403, FED.R.EVID., because of the danger of unfair prejudice, the district court did not abuse its discretion in admitting it.

III

Appellants contend that the indictment does not charge a crime and that the evidence (even taking the Government's view of the evidence) does not prove a crime under the Hobbs Act. Therefore, appellants contend, the indictment should have been dismissed or a directed verdict of acquittal should have been granted. Relying primarily on *United States* v. *Enmons*, 410 U.S. 396 (1973), appellants argue that their conduct could not constitute a crime under the Act because their purpose, in obtaining consent from the drivers to the reduction of the driver's share of the revenue, was not "wrongful." Appellants particularly rely on the allegation in the conspiracy count that it was a part of the conspiracy, *inter alia*, "to increase the employer share of the profits from the operation of the Company. . . ." Appellants argue that they had a right to protect their interest in realizing a profit, and sought to protect that interest by shifting to the employees the burden of paying into health, welfare and pension funds.

Preliminarily, we note that the record in *Cusmano* reflects that this very argument was there made by appellant with reliance of *Enmons*; and while the *Cusmano* court did not expressly rule on this contention, it did so by inference. If that court had accepted this argument that the conduct alleged in the indictment did not amount to a Hobbs Act violation, it would have reversed and remanded for dismissal of the indictment. Instead, the court, because it determined that the indictment had been constructively amended at trial, reversed but remanded for a new trial.

In any case, we conclude that the doctrine of *Enmons* does not support appellant's contention that the indictment should have been dismissed or a verdict directed. In that case, the defendants, members and officials of labor unions on strike for a new collective bargaining contract with higher wages, committed acts of violence against the employer. The acts of

violence were the basis of the Hobbs Act indictment. The district court dismissed the indictment on the ground that such acts of violence were not covered by the Act. The Supreme Court agreed, holding only that the Act does not proscribe "the use of force to achieve legitimate collective-bargaining demands." *Id.* at 408. The Court held that the use of "force, violence or fear" is not "wrongful," as is required by the Act, unless "the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400.

In the instant case, the Company, for which appellants acted, had no legitimate claim to the "service charge" of 11% of the gross revenues. This is true because the existing contracts expressly required the Company to make the payments to the welfare and pension funds out of the Company's own funds. Indeed, the contract provided that it would be "unlawful and illegal" to deduct the welfare and pension payments from the owner-operator's gross earnings. Moreover, the provision requiring the Company to make payments to the pension and welfare funds was, as stated, contained in a collective bargaining contract, and yet the agreement to shift this burden to the drivers did not result from collective bargaining. It is true that co-defendant and appellant Smith, the business agent for the local, signed the agreement, but this was done after it had been individually signed by the drivers as a result of individual negotiation with and pressure exerted on them by representatives of the Company. As we see it, the situation for purposes of the applicability of the Hobbs Act would not have been different had the drivers, as a result of threats of economic loss, been forced to take money out of their pockets and pay it to the Company to be used to satisfy the Company's legal obligation to the pension and welfare funds.

While it is not necessary to our decision here, we further point out that the *Enmons* exception to the application of the

Hobbs Act has been held to be confined to payments gained or sought in furtherance of legitimate *labor* objectives. *United States* v. *Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975). Further, in *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), it is said:

> More importantly, *Enmons* is a labor case. The Court's reasoning was obviously and explicitly tied to the labor context and more specifically to the strike context. Any application of *Enmons* to cases outside of that context must be done with caution.

603 F.2d at 419.

We therefore conclude that the indictment charges crimes under the Hobbs Act and that, under the Government's view of the evidence, a case was made for submission to the jury.

IV

Appellants further contend that there was not sufficient evidence to establish a conspiracy between the appellants and Cusmano, who actually obtained the signatures of the drivers on the agreement allowing the deduction of 11% from their share of the revenues. Meli contends that he was only a salesman for the Company and knew nothing of it. Russo claims that he was an "outside" man and, though he was a 50% owner and officer of the Company, had nothing to do with either the Company's labor relations or Cusmano's activity. Smith contends that he had no knowledge of the pressure placed on the drivers to execute the agreement and that he thought that it was a proper agreement when he signed it. We conclude, however, that there was substantial evidence, taking the view most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), to support the allegations in each count of the indictment.

Appellants make other claims of reversible error but, upon due consideration, we conclude that they are not well taken and must be overruled.

The judgment of the district court is therefore Affirmed.

BOYCE F. MARTIN, JR., Concurring. Given both the obvious interdependence between Judge Brown's opinion in this case and *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981), an opinion which I authored, and the thorny issue at stake in each, I feel a special concurrence is in order. As the *Cusmano* opinion implies, the panel considered and resolved affirmatively the question of whether the Hobbs Act applies to employer activity of the character proven here. I continue to believe that *Cusmano* was decided correctly.

I should add that I agree with Judge Holschuh's analysis of *United States* v. *Enmons*, 410 U.S. 396 (1973). We part company, however, over its application to the facts of this case. In *Enmons*, in the context of a lawful strike by a union in pursuit of a collective bargaining agreement, the Court held that the utilization of wrongful means in pursuit of legitimate labor objectives, although punishable by other laws, did not violate the Hobbs Act. The distinguishing factor in this case, it seems to me, is the objective. Here the employer, outside the collective bargaining context, attempted to obtain a wrongful means and under the guise of "service charge" an objective which the parties' own contract specified would be "unlawful and illegal" — the shifting of responsibility for welfare and pension fund payments to the employees. It seems to me that under these circumstances *Enmons* is no bar to application of the Act.

HOLSCHUH, District Judge, concurring only in the result.

This case, in my view, is of great significance because of its potential impact on the activities of both labor and management in the resolution of industrial disputes. It squarely presents the important question of the extent to which the Hobbs

Act, a criminal statute with severe penalties for its violation, applies to disputes between labor and management over the terms and conditions of employment, a subject that is already extensively regulated by other federal statutes.

In labor's struggle for higher wages and better working conditions and in management's efforts to minimize labor costs, the use of threats of economic loss is commonplace. Employees threaten to shut down an employer's plant by strike if their demands for higher wages are not met; employers in today's economy have threatened to shut down their own plants if employees do not agree to reduce their wages. Threats of economic loss take many forms, of course, and occur in many different settings. Some are properly made across a conference room table during collective bargaining negotiations; some are surreptitiously and improperly made and clearly constitute unfair labor practices. The question of when a threat of economic loss made during the course of a labor dispute between an employer and the employer's own employees becomes not just an unfair labor practice but a violation of the Hobbs Act, the critical issue on this appeal, is neither well settled nor easily resolved.[1] This case, with its *Cusmano* companion, may be the first case in which the Hobbs Act has been held to apply to activities between an employer and the employer's own employees while engaged in an attempt to resolve a labor dispute over terms and conditions of employment.[2] The ramifications of the majority opinion are

---

[1] Counsel for the Government, at the outset of his oral argument in this case, stated "I don't think [the scope of Enmons] has been adequately determined as of this point," referring to the need to have this Court determine the applicability of the Hobbs Act, as interpreted and applied by the Supreme Court in United States v. Enmons, 410 U.S. 396 (1972), to cases of this nature involving an employer and the employer's own employees.

[2] See *infra*, Section IV, distinguishing United States v. Quinn, 514 F.2d 1250 (5th Cir. 1975), and United States v. Cerilli, 603 F.2d 415 (3rd Cir. 1979), cited in the majority opinion.

both far-reaching and, to me, troublesome for both labor and management.

Although, for the reasons hereafter set forth, I do not believe that it was Congress' intention that the Hobbs Act apply to the conduct of the defendants in this case, I must agree with the majority that the panel which previously heard the *Cusmano* appeal silently but implicitly concluded that the activities of the defendants in this case do constitute a Hobbs Act violation. It is because I regard that earlier decision as being binding on this panel, absent an *en banc* decision overruling the *Cusmano* decision, that I concur in the result reached by the majority in the present case. However, I write separately to state my disagreement with the very broad interpretation given to the Hobbs Act by these decisions and my own belief that they are contrary to both the intention of Congress and the Supreme Court's interpretation of the Act as set forth in *United States* v. *Enmons*, 410 U.S. 396 (1972).

I.

A.

Any consideration of the legislative background of the Hobbs Act must begin with the Federal Anti-Racketeering Act of 1934[3] which resulted from an investigation by the Senate Committee on Interstate Commerce of "rackets" and "racketeering" in the United States. The original Senate bill contained prohibitions against violence or coercion in connection with interstate commerce, and although a memorandum of the Justice Department referred to the bill as not including "the usual activities of capitalistic combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering,"[4] represen-

[3] 48 Stat. 979.

[4] United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, 315 U.S. 521, 528 n. 5 (1942).

tatives of organized labor nevertheless expressed fear that the proposed legislation could result in serious injury to labor. In order to obtain labor's approval, the bill was revised[5] to include an exception concerning "the payment of wages by a bona fide employer to a bona fide employee."[6]

---

[5] As enacted, § 2 of the Act provided, in part,

> Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce —
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); . . .

[6] In a letter to the House Committee on the Judiciary, the Attorney General to the Committee stated, in part,

> We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.
>
> The original bill was susceptible to the objection that it might include within the prohibition the legitimate and bona fide activities of employers and employees. As the purpose of the legislative is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence, extortion or coercion, which affects interstate commerce, it seems advisable to definitely exclude such legitimate activities.

In *United States* v. *Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America*, 315 U.S. 521 (1942), the Supreme Court was required to interpret this exception. That case involved a local union, its officers and other members who were indicted under the Hobbs Act for using threats and violence to coerce owners of trucks entering New York City to pay a day's union wages for services, regardless of whether those services were needed or wanted by the truck owners. The Court gave the exception a very broad construction, holding that it covered not only persons who were employees at the time of the alleged misconduct but also third persons who attempted by violent means to become employees. Of greater importance, however, was the Court's extremely broad construction of the terms "wages," "bona fide employee" and "bona fide employer" contained in the exception. The majority extended the immunity of the exception even to the defendants in the *Local 807* case who, after their offer to perform services was rejected, demanded payment for work that was not done and resorted to violence to obtain such payments. The dissenting Justice strongly argued that such payments could not be considered as "wages," such defendants could not be considered as "bona fide employees" and the compulsion of such payments could not be considered "a legitimate object of a labor union."

Id. at 541.

Congress expressed its disapproval of the Supreme Court's *Local 807* decision by enacting the Hobbs Act. The House bill which became the Hobbs Act eliminated the wage exception that had been the basis for the *Local 807* decision, and it is clear that the specific purpose of the Act was to correct the result in

the *Local 807* case.[7] In *United States* v. *Yokeley*, 542 F.2d 300, 302 (6th Cir. 1976), the Sixth Circuit Court of Appeals concluded that,

> the legislative history of the Hobbs Act shows that the sole purpose of Congress was to eliminate § (2)(a) of the Anti-Racketeering Act of 1934 on which the *Local 807* decision turned so as "to prevent the rendition of that sort of decision by any court in the future. . . ."

Although Congress intended to include within the scope of the Hobbs Act the use of violence and extortion to extract payments for superfluous services rejected by an employer, Congress was also concerned that the new Act not be construed in such a manner as to affect national labor-management relations acts. The Hobbs Act, therefore, expressly provided that the Act "shall not be construed to repeal, modify or affect" the Clayton Act,[8] the Norris-LaGuardia Act,[9] the Railway Labor Act,[10] or the National Labor Relations Act.[11]

It seems clear that neither the Anti-Racketeering Act of 1934 nor its successor, the Hobbs Act of 1945, was designed to punish labor for activities employed in its pursuit of legitimate

---

[7] As Congressman Hancock explained,

> [t]his bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does.

91 Cong. Rec. 11900

[8] The Hobbs Act specifically states it will not affect 15 U.S.C. § 17, the codification of the section of the Clayton Act providing that the antitrust laws are not applicable to labor organizations.

[9] 29 U.S.C. §§ 101-115.

[10] 45 U.S.C. §§ 151-188.

[11] 29 U.S.C. §§ 151-166.

labor goals, even though those activities may include violence or the threat of economic loss. As even the dissenting Justice in the *Local 807* case acknowledged, "the procuring of jobs by violence is not within the [Anti-Racketeering] Act." 315 U.S. at 541. The problem with the majority decision in the *Local 807* case was its holding that the procurement of money by violence for the performance of no work or superfluous work in the face of a refusal by the victim to enter into an employment agreement was also not within the Anti-Racketeering Act. The Hobbs Act made it clear that Congress did not regard obtaining money for no work or for superfluous and rejected services to be a legitimate objective of a labor union.

The important point is that neither the Anti-Racketeering Act nor the Hobbs Act was intended to make criminal the use of violence or threats of economic loss if such activities had a legitimate labor goal, *e.g.*, procurement of jobs involving bona fide and substantial services or obtaining increased wages or better working conditions. The means used to obtain such goals may well constitute an unfair labor practice under the extensive federal acts governing the conduct of labor, and the use of violence to obtain such goals may be punishable as a crime under local statutes. However, insofar as the Hobbs Act is concerned, its legislative background reveals no intention of Congress to impose the severe criminal sanctions of that Act upon activities of labor aimed at achieving a legitimate labor objective. If Congress did not intend to impose the severe criminal sanctions of the Hobbs Act on activity of labor having a legitimate labor objective, then it must follow that it did not intend to impose those sanctions on activity of management having a legitimate management objective.

B.

Following the passage of the Hobbs Act, the Supreme Court had occasion to construe the Act in order to determine its application in cases involving labor disputes. *United States* v. *Green*, 350 U.S. 415 (1955), involved, as did the *Local 807* case, the use of threatened force and fear to force an employer to pay money, in the words of the *Green* indictment, "for imposed, unwanted, superfluous and fictitious services of laborers." *Id.* at 417. As in *Local 807*, the prospective employer had refused to employ the unneeded and unwanted workers. Considering the legislative history of the Hobbs Act, the Court's conclusion in *Green* that the allegations of the indictment came within the terms of the Act is not surprising. The extraction of money for superfluous services rejected by the prospective employer could not be considered a legitimate function of labor.

Approximately seventeen years later in *United States* v. *Enmons*, 410 U.S. 396 (1972), which is unquestionably the leading Supreme Court case on the applicability of the Hobbs Act in labor-management cases, the Supreme Court again construed the scope of the Hobbs Act's coverage. Unlike *Local 807* and *Green*, the *Enmons* case did not involve an attempt to obtain tribute for superfluous and rejected services. It involved, as does the present case, a labor dispute between an employer and its own employees over the terms and conditions of employment. In *Enmons*, employees of Gulf States Utilities Company were on strike and were seeking a new collective bargaining agreement. The defendants, members and officials of the employees' labor union, were indicted under the Hobbs Act for using violence — including damaging the company's transformers and blowing up a substation owned by the company — in order to force the company to pay higher wages to the employees through a new agreement.

In reaching its decision that the facts in *Enmons* did not constitute a violation of the Hobbs Act, the Court relied not only upon the legislative history but also upon the specific language of the Act, which indicated to the Court Congress' intention to restrict the scope of the Hobbs Act in labor disputes. The Supreme Court's analysis of the language of the Hobbs Act focused on the meaning of the term "wrongful" as used in the Act. The term "wrongful," in the words of the Supreme Court, "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." 410 U.S. at 400. The Supreme Court held that the term "wrongful" did not refer to the *means* employed to obtain the property; those means proscribed by the statute are always wrongful. Instead, the Court concluded that the term "wrongful" must apply to the *objective* of the defendants, and the Court held that only where the alleged extortionist has no lawful claim to the property obtained would the obtaining of the property be "wrongful." Inasmuch as the objective of the employees — obtaining higher wages in return for genuine services — is a legitimate union objective, the Hobbs Act was held to have no application to the defendants, even though the means used to achieve that objective were clearly wrongful.

The Supreme Court found further support for its decision in (1) the absence of any prior cases in which the Hobbs Act had been applied to the fact pattern in *Enmons*, (2)the fact that the Hobbs Act is a criminal statute and must, therefore, be strictly construed, with any ambiguity being resolved in favor of lenity, and (3) the fact that nothing in the Act's history or its language could justify " the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." 410 U.S. at 411.

Thus, as I read *Enmons*, use of wrongful *means* — and the use of violence on a picket line is clearly wrongful — is not enough to come within the coverage of the Act. To come within the prohibitions of the Act the *objective* must be wrongful, *i.e.*, the use of robbery or extortion or violence to obtain property to which the defendant "has no lawful claim." Because striking employees may lawfully claim higher wages, this is a legitimate labor objective, and the Hobbs Act does not apply to the conduct of such employees regardless of how reprehensible it may be and regardless to the fact that such conduct may violate other state or federal laws.

If, then, the Act does not apply to a labor union's use of wrongful means to achieve legitimate labor objectives, then certainly the same construction applies to management, and the Act should not apply to management's use of wrongful means to achieve legitimate management objectives. If management in the *Enmons* case, for example, had retaliated by violently assaulting the strikers in an effort to break the strike and to force acceptance of management's wage offer, would management have been guilty of a violation of the Hobbs Act? Clearly such conduct would have violated other laws, but under the Supreme Court's interpretation of the Hobbs Act I do not believe such conduct would have come under the coverage of that Act. Although the means employed in my hypothetical case are just as deplorable as the means employed by the striking workers in *Enmons*, Congress did not intend the Hobbs Act to regulate the *means* employed by either labor or management when they are seeking the *legitimate objectives of labor or the legitimate objectives of management.*

If my reading of *Enmons* is correct, then it remains to apply that teaching to the facts of the present case.

II.

The pertinent facts in the present case are set forth in the majority opinion. It is undisputed that the company was contractually obligated by the Central States Area Local Cartage Supplemental Agreement to contribute to the Central States Southeast and Southwest Areas Health and Welfare Fund as well as to the Pension Fund, and that the company was prohibited by the agreement from deducting those contributions from the driver's gross earnings. It is also undisputed that the company had not made the required contributions and was in breach of the collective bargaining agreement. The drivers themselves sought to enforce compliance with the agreement by organizing a grievance committee which presented their grievances to the company, including the demand that the company make the required contributions to the health and welfare and pension plans. As the majority opinion notes, the company attempted to resolve those grievances by calling a meeting of the drivers and proposing a new wage agreement whereby the amount of the gross payments received by the cartage company for each load hauled by a driver would be reduced by 15%, prior to any division of the money between the company and the drivers, in order to cover the company's cost of meeting its contractual obligations. When the drivers refused to agree to this reduction in their compensation, a second attempt was made by the company to resolve the dispute. In a subsequent meeting the company proposed that the earnings of each driver would be reduced by the deduction of an 11% "service charge" from the gross amount available for distribution between the company and a driver in return for which the company would meet its obligations under the

collective bargaining agreement. This proposed reduction in compensation was also rejected by the drivers.[12]

Having failed in the efforts to obtain a modification of the wage agreement by a vote of the drivers during the meetings of the drivers and management, the company's president, Joseph Cusmano, called each of the drivers individually into his office and through promises, threats of economic loss and misrepresentations, obtained their signatures on a Supplementary Agreement which changed the wage agreement previously agreed upon by reducing the drivers' compensation through deduction of the 11% from the gross amount available for distribution between the company and the drivers.

III.

Viewing the undisputed evidence in the light most favorable to the Government, I am unable to conclude that the defendants' actions fall within the scope of the Hobbs Act and outside the category of activities found in *Enmons* decision to be excluded from the Hobbs Act's coverage. This conclusion rests upon my opinion that an attempt by management to reduce its labor costs through a modification of a collective bargaining agreement is a legitimate management objective.

---

[12] As the Government noted in footnote 7 at page 14 of its brief in this case,

> [t]he 11% "service charge" would reduce the amount available for division between a driver and [the company] under the provisions of the collective bargaining agreement to 89% of the gross. Thus an owner-operator with a tractor would receive 60% of that 89%, actually only 53.4% of the gross — 6.6% less than the amount to which he was entitled [under the original collective bargaining agreement].

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), explicitly sets forth the means by which a mid-term modification of a collective bargaining agreement may be obtained. Failure to comply with the procedures set forth in § 8(d) constitutes an unfair labor practice. *See Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971); *N.L.R.B.* v. *Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669, 675 (10th Cir. 1980). Section 8(d), therefore, is a recognition by Congress of the right of labor and management to seek modifications of a collective bargaining agreement during the life of that agreement and prescribes the procedures to be followed for obtaining such modifications. Thus, the fact that a collective bargaining agreement is in effect does not mean that labor and management cannot seek changes in that agreement or that demands for concessions are in any sense unlawful. Those demands do not, of course, have to be accepted, but the objective of labor in seeking greater benefits and the objective of management in seeking lower labor costs are legitimate objectives even though the parties are already contractually bound at that time by a previously executed collective bargaining agreement.

I recognize that the evidence in the present case established without question that the defendants (1) breached the Central States Area Local Cartage Supplemental Agreement, and (2) committed an unfair labor practice in obtaining a modification of the Local Cartage Steel Rider through the tactics resorted to by defendants. However, while the *means* employed by the defendants to obtain a modification of the compensation agreement were highly improper, the fact that the defendants employed such improper means does not establish that the defendants violated the Hobbs Act. The means employed by the striking workers in *Enmons* to obtain a more favorable compensation agreement — physical violence itself — were obviously improper and illegal, and yet the

Supreme Court found that the actions of the defendants in *Enmons* did not constitute a violation of the Hobbs Act since the defendants' objective was legitimate. The objective of management in the present case — reduction of its labor costs in the form of lower wages — is just as legitimate an *objective* as was the objective of labor in the *Enmons* case — increased labor costs in the form of higher wages. While the use of wrongful means in both *Enmons* and the present case is deplorable, the use of the wrongful means does not by itself constitute a violation of the Hobbs Act.

The foregoing conclusion is buttressed by the same factors which the Supreme Court considered in *Enmons*. First, I am unable to find any reported cases, with the exception of this Circuit's recent decision in *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981), in which the Hobbs Act has been applied to the fact pattern found in the present case, *i.e.*, to an employer who obtains a modification of a collective bargaining agreement by threatening his employees with economic loss.

Second, the Hobbs Act is a criminal statute and must, therefore, be strictly construed. Any ambiguity in that statute must be resolved in favor of lenity. *United States* v. *Enmons*, 410 U.S. at 411. It is not at all clear, in light of the legislative history of the Hobbs Act and the Supreme Court's interpretation of the Act, that the Act sweeps within its coverage the labor-management activities involved in this case. *Enmons* directs this Court to resolve this ambiguity in favor of a finding that the present factual pattern does not constitute a violation of the Hobbs Act.

Finally, I am unable to find anything in the Act's history or its language which could justify the conclusion that Congress intended to create extraordinary changes in federal labor law when it enacted the Hobbs Act. Congress has carefully and

comprehensively regulated the field of labor-management relations and has provided specific means and penalties for the enforcement of collective bargaining agreements and for the prevention of unfair labor practices. The majority opinion today makes conduct — improper mid-term changes in a collective bargaining agreement — which is expressly covered by provisions of the National Labor Management Relations Act containing noncriminal penalties into a federal crime with severe penalties. I question whether Congress "intended to work such an extraordinary change in federal labor law." *Enmons*, 410 U.S. at 411.

IV.

The majority opinion places the present case outside the scope of *Enmons* on the ground that the company had "no legitimate claim" to the drivers' reduced compensation for the purpose of meeting its obligations to the welfare and pension funds because the existing contracts expressly required the company to make those payments out of its own funds.

In *Enmons*, the Supreme Court repeatedly referred to "legitimate" union objectives, "legitimate" labor ends and "lawful" claims to property. It is the interpretation of such language that presents the central issue in the present case.

In my view, management in the present case had a "legitimate" management *objective* in seeking a reduction of its labor costs by a mid-term modification of the collective bargaining agreement. As a result of that modification, the company's expenditures for drivers' compensation were reduced and, as to the money saved under the modified agreement, the company certainly had a "lawful" claim.[13] What may well have been

[13] Judge Martin in his concurring opinion concludes that the company's objective of "shifting of responsibility for welfare and pension fund

(footnotes continued on next page)

"unlawful" and not "legitimate" were the *means* used by management to obtain that objective, and it is here that the majority makes its second effort to distinguish *Enmons*.

The majority points out,

> [m]oreover, the provision requring the Company to make payments to the pension and welfare funds was, as stated, contained in the collective bargaining agreement, and yet the agreement to shift this burden to the drivers did not result from collective bargaining. It is true that co-defendant and appellant Smith, the business agent for the local, signed the agreement, but this was done after it had been individually signed by the drivers as a result of individual negotiation with and pressure on them by representatives of the Company.

Accepting all of this as true and considering it in the light most favorable to the Government, the conduct of the company's representatives in attempting to bypass the union and

---

(footnotes continued from previous page)
payments to the employees" was not a legitimate management objective. The objective of the company in this case — to obtain a reduction in the drivers' compensation in order to offset the company's cost of its contributions to the health and welfare and pension plans — seems to me to be a legitimate management objective. Even conceding that the company's efforts in the present case had the effect of shifting the responsibility for the fund payments to the employees and constituted a patent violation of the collective bargaining agreement, the "objective," in the context of the *Enmons* case, was legitimate, and neither the resulting breach of contract nor the parties' own characterization of such a breach as "unlawful" or "illegal" changes a legitimate management objective into an illegitimate one. One of the problems of the majority decision, in my view, is its reliance upon language in a collective bargaining agreement and the breach of that agreement as a basis for finding no legitimate management goal and therefore a Hobbs Act violation — a rationale that injects the spectre of severe criminal sanctions into the resolution of labor-management disputes. Part V, *infra*.

deal directly with the drivers may well have been an unfair labor practice; the modification of the compensation agreement may well have been a breach of the welfare and pension payment agreement; and certainly the use of misrepresentations and threats of economic loss in the implementation of management's efforts to change the compensation agreement are not only despicable tactics but could be in violation of other federal or local statutes. Indeed, it may be assumed that the modified agreement itself was unenforceable and that the drivers have the right to recover every dollar to which they were entitled under the original collective bargaining agreement. It does not follow, however, that the conduct of the defendants in obtaining a modification of the compensation agreement was a violation of the Hobbs Act. Under the reasoning of the *Enmons* decision and for the reasons previously stated, I do not believe that it was. The conduct in question may be assumed to be "unlawful" in the very same manner that the use of the extreme violence in *Enmons* to obtain a favorable bargaining agreement was clearly "unlawful," but as the Supreme Court has construed the Hobbs Act, the test of its application does not depend on the legality of the means used to obtain a labor or management objective but only on the legitimacy of that objective.

The majority sees this case as being no different "had the drivers, as a result of threats of economic loss, been forced to take money out of their pockets and pay it over to the Company to be used to satisfy the Company's legal obligation to the pension and welfare funds." In the sense that any reduction in compensation is "money out of their pockets," the analogy is accurate. What the company did with the money it saved is of little, if any, significance; it may or may not have used it to pay its debt to the union funds or for some other corporate purpose. However, the objective of the company — a reduction of its labor costs — remains, it seems to me, a

legitimate objective of management. In *Enmons*, management, as a result of the violent activity of the employees, may well have been forced to take money out of the company's "pockets" and pay it to the employees to satisfy the employees' demands for higher wages. The *means* used by the company representatives in the present case (fear of economic loss) and the *means* used by the employees in *Enmons* (outright violence) are both to be condemned, but the Hobbs Act was not intended to control or make criminal the means used to achieve legitimate goals of management or labor.

Finally, the majority also suggests that the present case is not a "labor case" and that, accordingly, the *Enmons* exception to the application of the Hobbs Act does not apply. I recognize that *Enmons* "is a labor case" and that "any application of *Enmons* to cases outside of that context must be done with caution." *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979). However, the present case *is*, in my opinion, a "labor case." The majority opinion correctly states that the undisputed facts show that the drivers presented management with a list of grievances, including an insistence that management comply with its obligation under the current collective bargaining agreement to pay contributions to the employees' health and welfare and pension plans. Undeniably a "labor dispute" existed in the present case, and that dispute, like the dispute in *Enmons*, involved the terms and conditions of employment. It was while attempting to resolve the labor dispute and avoid a strike by the drivers by seeking concessions in the form of lower wages in return for management's fulfillment of its other contractual obligations that management, through the appellants, resorted to wrongful means. While caution should be exercised in extending *Enmons* too far — especially to cases outside the labor context — equal, if not greater, caution should be exercised in *not* applying *Enmons* to cases such as ours which *do* involve labor disputes.

Neither of the two cases relied upon by the majority for its position that the case *sub judice* is not a "labor case" dealt with a fact pattern similar to the one before us. Although Count I in *United States* v. *Quinn*, 514 F.2d 1250 (5th Cir. 1975), involved actions taken in response to a labor dispute, the defendant in that case was not an employee or agent of the employer. Instead the defendant was a nonemployee who volunteered to represent the striking employees and who illegally received money from the employer while acting as the employees' representative. This receipt of money was a criminal offense under 29 U.S.C. § 186(a), and the defendant had no lawful claim to the receipt of the money. Additionally, as noted in the concurring opinion in that case, the payment could have been considered a personal payoff, clearly not a legitimate labor objective as numerous cases have held. *United States* v. *Quinn*, 514 F.2d at 1268. It is clear that the *Quinn* case fell within the scope of the Hobbs Act because the defendant's objective was itself unlawful.

The other decision cited in Part III of the majority opinion, *United States* v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979), did not involve any labor dispute. Instead, *Cerilli* involved coerced political contributions from the lessors of equipment seeking contracts with a state agency.

V.

The broad interpretation of the Hobbs Act impliedly given by the panel in *Cusmano* and expressly given by the majority in the present case in its application to the resolution of disputes between an employer and its employees dealing with terms and conditions of employment is troublesome. Although I strongly condemn the tactics of the defendants in the present case, I am fearful of the ramifications of such an interpretation to both management and labor.

The thrust of the majority decision is that *Enmons* does not apply because the employer in the present case, already contractually bound to pay the agreed upon compensation and contributions to the union funds, had no legitimate objective in seeking a reduction in the drivers' compensation. However, many employers who are contractually bound by collective bargaining agreements may well attempt, due to changed economic conditions, unexpected reversals in the employer's business and other reasons, to seek a reduction in their labor costs. Such efforts may well be accompanied by threats of economic loss to the employees, *e.g.*, the threat of closing the plant or moving it to a lower labor cost region or going out of business altogether, if reduced labor costs are not agreed upon.

I see little, if any, difference between the present case and one in which the management of a company that has suffered severe financial loss attempts, without success, to have its employees by vote reduce their contract wages and, having failed in this attempt, then tells its employees that unless they agree to management's requested reduction the company will shut down its operation and lay off all its employees. As I understand the majority opinion, if management in such a situation makes that threat to the union representative it would be considered in the context of a collective bargaining negotiation and, therefore, it would not be a violation of the Hobbs Act. However, if management makes the identical threat to any of its employees it would be a violation of the Hobbs Act and a criminal offense. In my view, the Hobbs Act should not be construed to convert what might be an unfair labor practice into a severe criminal offense involving a possible term of imprisonment of twenty years.

If the Hobbs Act is construed in the manner adopted by the majority, the resulting Damoclean sword would hang as much over the head of labor as it would over the head of management. If, in the present case, the contract had exempted the

company from making contributions to the benefit funds, but the employees, disgruntled by the exemption, threatened to strike if the employer did not make such benefit payments, then under the rationale of the majority opinion I assume the employees would be guilty of a Hobbs Act violation on the theory that they have no "legitimate" claim to those increased benefits. Similarly, under the majority rationale, employees would be guilty of this criminal offense whenever a wildcat strike occurs as a result of the employees demanding more than the employer is contractually obligated to provide. Even more troublesome would be those cases in which ambiguous contract language makes it difficult to discern whether the employees' or employer's demands for concessions are "legitimate" or "not legitimate." The spectre of a possible federal grand jury indictment would be present in all such cases and would be an unwarranted and unwelcome intruder in the resolution of industrial disputes between an employer and its employees over the terms and conditions of employment.

VI.

While I believe that Congress did not intend the Hobbs Act to apply to factual patterns such as the one before this panel, this very issue has previously been addressed and silently determined by another panel of this Circuit. The majority opinion correctly notes that the question of the sufficiency of the indictment and the evidence involved in this case to establish a violation of the Hobbs Act was briefed and presented to the panel of this circuit which decided *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981). I agree with the majority's position that the *Cusmano* panel implicitly decided that the indictment involved in this case states a violation of the Hobbs Act when the panel remanded the *Cusmano*

case for a new trial. It is also clear that the *Cusmano* panel implicitly decided that the evidence in that case was sufficient to sustain a conviction under the Hobbs Act.

While it is true that questions neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents, *Webster* v. *Fall*, 266 U.S. 507 (1925); *Soyka* v. *Alldredge*, 481 F.2d 303 (3d Cir. 1973), it is equally true that where an issue is implicitly decided because it was necessary to resolve that issue in order to reach the result of the decision, the implicit decision is treated as precedential authority. *Popeko* v. *United States*, 513 F.2d 771, 773 (5th Cir. 1975). Thus, the implied decision in *Cusmano* must be treated as precedential authority. The question remaining, however, is to what extent the *Cusmano* panel's decision controls the decision of the present panel.

Most of the United States Courts of Appeals follow the rule that one panel of a circuit court may not overrule the decision of another panel; only the Court of Appeals sitting *en banc* may overrule the decision of a panel. *E.g.*, *Popeko* v. *United States*, 513 F.2d 771 (5th Cir. 1975); *United States* v. *Mount*, 438 F.2d 1072 (9th Cir. 1970). The case law in the Sixth Circuit, however, appears to be inconsistent on the question of whether this rule is followed in this circuit. In *Timmreck* v. *United States*, 577 F.2d 372 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979), the opinion of the panel states, "[o]ne panel of this Court cannot overrule the decision of another panel; only the Court sitting en banc can overrule a prior decision." 577 F.2d at 376 n. 15. However, in *Speigner* v. *Jago*, 603 F.2d 1208 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980), Judge Peck states that "there is no rule in this Circuit which requires an en banc hearing to overrule a decision of a three-judge panel. Further, such a requirement has not been followed in practice by this Court." 603 F.2d at 1212 n. 4. While Judge Peck spoke only for himself on this issue since

Chief Judge Edwards concurred separately, not finding it necessary to overrule the precedent in question, and Judge Weick dissented, he correctly noted that in practice the Sixth Circuit has not always followed the rule that one panel may not overrule an earlier decision. *See, e.g., United States* v. *Bess*, 593 F.2d 749 (6th Cir. 1979); *Beasley* v. *United States*, 491 F.2d 687, 696 (6th Cir. 1974).

In my opinion, the position adopted in *Timmreck* is the better rule since it should lead to consistency in panel decisions and would discourage unwarranted appeals. Thus, in the present case I feel this panel is bound by the decision of the *Cusmano* panel on the question of the sufficiency of the indictment and evidence since there are no facts in this case which would allow the *Cusmano* decision to be meaningfully distinguished.

Based on the rule adopted in *Timmreck* that a later panel may not overrule the decision of an earlier panel, and in light of the fact that the *Cusmano* panel implicitly decided the issues before this panel, I reluctantly concur in the result reached by the majority.

APPENDIX C

ORDER DENYING PETITIONERS' MOTION FOR A HEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed July 25, 1983)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

JAMES A. RUSSO; VINCENT MELI;
ROBY G. SMITH
Defendants-Appellants.

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Judge; and HOLSCHUH,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled cases; and

A majority of the judges in active service on this court not having favored rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

---

* The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Judge Holschuh dissents from the denial of the petition to rehear for reasons stated in his dissent from the panel opinion.

It is so ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX D

ORDER STAYING MANDATE

(Filed August 5, 1983)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs

No. S. 80-5052/54/55

ROBY G. SMITH, ET AL.,
Defendants-Appellants.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN, CLERK

/s/ JOHN P. HEHMAN

APPENDIX E

INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
(Filed April 6, 1977)

Lawrence Gubow
7-80488

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT MELI, JOSEPH D. CUSMANO,
JAMES A. RUSSO, a/k/a Jack Russo, and
ROBY G. SMITH,
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
(18 U.S.C. 1951 — Conspiracy to Violate the Hobbs Act)

1. At all times pertinent hereto, J & J Cartage Company, hereinafter referred to as the Company, was a Michigan corporation, engaged in the transportation of steel in the Eastern District of Michigan. Substantial amounts of steel were transported by the Company for Chrysler Corporation, Ford

Motor Company, the Budd Company, and other automotive related companies located in the Eastern District of Michigan. The steel was used in making products by the aforementioned companies, whose products moved in interstate commerce from said companies outside the State of Michigan. In addition, the Company purchased materials, supplies, fixtures and equipment made and produced by manufacturers and suppliers in various states other than in the State of Michigan, and said materials and supplies moved in interstate commerce.

2. At all times pertinent hereto, the Company was contractually bound by the terms of the National Master Freight Agreement, Central States Area Local Cartage Supplemental Agreement and certain supplemental agreements thereto with the International Brotherhood of Teamsters, all hereinafter referred to as Master Agreements, and was required to pay certain employer contributions to the Central States Southeast and Southwest Health, Welfare and Pension Funds, including the Michigan Conference Health and Welfare Fund, all hereinafter referred to as the Funds.

3. At all times pertinent hereto, JOSEPH D. CUSMANO owed fifty percent (50%) of the stock of the Company and JAMES A. RUSSO owned fifty percent (50%) of the stock of the Company, and both were corporate officers.

4. At all times pertinent hereto, VINCENT MELI was an employee, agent and labor negotiator of the Company.

5. At all times pertinent hereto, ROBY G. SMITH was a Business Agent for the International Brotherhood of Teamsters, Local 299, and assigned to represent the drivers who were union employees of the Company and to protect their union contractual terms and conditions with said Company.

6. That commencing on or about the 18th day of November, 1972, and continuously thereafter up to on or about the 10th day of April, 1974, the exact dates being to the Grand Jury

unknown, in the Eastern District of Michigan, VINCENT A. MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO, and ROBY G. SMITH, defendants herein, and Charles Penniman, unindicted co-conspirator, did knowingly and willfully conspire, combine, confederate and agree together, and with each other, and with persons unknown to the Grand Jury, to obstruct, delay and affect interstate commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities, that is, steel and steel products, in such commerce, and did attempt to do so by extortion, to-wit: by threats of economic loss, that is to say, the defendants did force the drivers who were employees, agents, and owner-operators of the Company to pay the Company employer contributions to the Funds with their consent induced by the wrongful use of force and fear, in that the defendants did threaten certain drivers of the Company with unprofitable truck loads, the loss of their jobs, and the loss of equity in their equipment unless they agreed to the deduction from their weekly gross earnings.

7. That it was a part of the conspiracy that the defendants would attempt to increase the employer share of the profits from the operation of the Company, by forcing the drivers who were employees, agents and owner-operators of the Company to pay the Company employer contributions, as provided for under the Master Agreements relative to employer contributions to the Funds.

8. That it was a part of said conspiracy that the said defendants conducted meetings with the drivers who were employees, agents and owner-operators of the Company in an attempt to obtain their consent for the Company to deduct eleven percent (11%) of their gross earnings, before paying said drivers their contractual rate of pay, thereby causing them to pay the Company employer contributions to the Funds.

9. That it was further part of the conspiracy, that the said defendants did contact and confront the drivers who were

employees, agents and owner-operators of the Company and caused them to sign an agreement, designated SUPPLEMENTARY AGREEMENT TO BASIC CONTRACT AND ALL SUPPLEMENTARY RIDERS AND/OR AGREEMENTS ATTACHED THERETO AND MADE A PART THEREOF, which agreement authorized the Company to compute their wages in such a way that compensation would be arrived at by deducting a service charge of eleven percent (11%) from their gross earnings, thereby causing them to pay the Company contributions to the Funds.

10. It was a further part of the conspiracy, that the Defendant, ROBY G. SMITH, assigned to represent the drivers who were members of Local 299 International Brotherhood of Teamsters, and who were employees, agents and owner-operators of the Company, in a manner that was free from corruption, partiality, improper influence, bias and undue influence, did sign the SUPPLEMENTARY AGREEMENT, described in paragraph 9 above as agent for the said drivers and did not act upon certain grievances and complaints related thereto, well knowing that his conduct in that regard was not in their best interest, that is to say that the said drivers should not have been required to pay the Company employer contributions to the Funds.

11. It was further part of the conspiracy, that for a substantial period of time beginning before November 1972 until approximately April 1973, the exact dates being to the Grand Jury unkown, the Company did compute the wages of the drivers who were the employees, agents and owner-operators of the Company, in such a way that compensation was arrived at after deducting an amount of money from their gross earnings, thereby causing the said drivers, to pay the Company employer contributions to the Funds without their consent.

All of the above in violation of Title 18, United States Code, Section 1951.

COUNT TWO

(18 U.S.C. 2 — Aiding and Abetting and
18 U.S.C. 1951 — Violation of the Hobbs Act by Extortion)

1. The Grand Jury realleges paragraphs one through five of the first count of this Indictment.

2. That between approximately the 18th day of November 1972 and the 10th day of April 1974 in the Eastern District of Michigan, VINCENT A. MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO, aided and abetted by ROBY G. SMITH, did unlawfully and willfully obstruct, delay and affect, or attempt to obstruct, delay and affect the commerce, as that term is defined in and by Section 1951 of Title 18, United States Code, to-wit: interstate commerce and the movement of articles and commodities, that is, steel and steel products, in such commerce and did attempt to do so by extortion, to-wit: threats of economic loss, that is to say, the defendants did force the drivers who were employees, agents and owner-operators of the Company, to pay the Company employer contributions to the Funds with their consent induced by the wrongful use of force and fear, in that the defendants did threaten certain drivers who were employees, agents and owner-operators and representatives of the Company with unprofitable truck loads, the loss of their jobs and the loss of equity in their equipment unless they agreed to the deductions from their weekly gross earnings.

All of the above in violation of Title 18, United States Code, Sections 2 and 1951.

THIS IS A TRUE BILL.

_____

FOREMAN

PHILIP VAN DAM
United States Attorney

GEOFFREY A. ANDERSON
Special Attorney
Detroit Strike Force
940 Federal Building
Detroit, Michigan 48226
Telephone: 313-226-7252

DATED: April 6, 1977

APPENDIX F

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

VINCENT MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO a/k/a Jack Russo, and ROBY G. SMITH,
Defendants.

Criminal Action
No. 77-80488

MEMORANDUM OPINION

The indictment in this action charges in two counts conspiracy to violate the Hobbs Act; violation of the Hobbs Act by extortion; and aiding and abetting. 18 U.S.C. §§ 1951 and 2. The following fact pattern can be derived from the indictment. The J & J Cartage Company was engaged in the transportation of steel in the Eastern District of Michigan. At all times pertinent, the company was contractually bound to the International Brotherhood of Teamsters. Defendants Cusmano and Russo were 50% owners of the company. Defendant Meli was an employee, agent and labor negotiator of the company and defendant Smith was a business agent of the union assigned to represent the drivers who were employees of the company. The indictment essentially charges that the defendants conspired together to coerce the drivers to pay the company/employer contributions to the various health, pension and welfare funds by threatening the

employees with unprofitable truck loads, loss of jobs, and loss of equity in their equipment. As part of said conspiracy, it is charged that the defendants caused the employees to sign a Supplementary Agreement to the Basic Contract which authorized the company to compute the drivers' wages in such a manner that compensation would be arrived at by deducting a service charge of 11% from their gross earnings. It is further alleged to be a part of said conspiracy that defendant/representative Smith signed said agreement for and on behalf of the employees and thereafter refused to act upon grievances and complaints related thereto. The criminal acts are alleged to have taken place between the 18th of November, 1972 and the 10th of April, 1974. As a violation of the Hobbs Act, it is alleged that the aforementioned acts did obstruct, delay and affect commerce by extortionate means. Now comes all of the defendants with various motions which will be addressed individually below.

Motions of Defendants Smith, Russo, Cusmano and Meli to Quash and Dismiss the Indictment:

The thrust of the Motion to Dismiss of all of the defendants is that, assuming *arguendo* that the facts as stated in the indictment are accurate, the indictment fails to state a crime under the Hobbs Act. The defendants argue that Congress did not intend Hobbs to apply to valid labor negotiations between union and management and that the facts alleged in the instant indictment concern the legitimate re-negotiation of an existing contract, necessitated by failing economic conditions or prompted by a desire for increased profits. Additionally, defendant Smith takes the position that under no circumstances was he able to exercise threats of economic loss nor could he control whether unprofitable truck loads were tendered to the drivers — contending such decisions were solely within the control of the company. Defendants rely primarily on *United State v. Enmons*, 410 U.S. 396 (1973).

The facts of *Enmons, Id.* at 397-399, show that the defendants, members and officers of various labor unions, were engaged in a legitimate strike in order to obtain higher wages — a legitimate objective. The strike, however, was punctuated by unlawful acts of violence resulting in damage to property. The Supreme Court held that Hobbs does not apply to the use of force to achieve legitimate labor ends. *Id.* at 401. The restrictive approach used by the court avoids Hobbs liability [potentially 20 years imprisonment and/or a $10,000.00 fine] in situations where militant strikers who, in the heat of legitimate activity, might perform some illegal act which in many instances could amount to a crime under state law subject to much more lenient sanctions. *Id.* at 401. Applying this rationale, the defendants would have this court view the increased profit motive as a legitimate end, thereby negating the application of Hobbs. Hobbs, being a criminal statute, must be strictly construed and any ambiguity resolved in favor of lenity. *Rewis v. United States*, 401 U.S. 808, 812 (1971). However, the Supreme Court has also expressly stated that the broad language of Hobbs manifests "... a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence". *United States v. Staszcuk*, 517 F.2d 53, 59 (7th Cir. 1975), citing *Stirone v. United States*, 361 U.S. 212 (1960); *cert. den.* 423 U.S. 837 (1975).

Defendants read paragraph 7 of Count I as the crux of the indictment. Taken alone and omitting the word "conspiracy", paragraph 7 could be facially interpreted as being descriptive of legitimate management activity, *i.e.*, an attempt to increase the employer's share of the profits. However, the inclusion of the word "conspiracy" necessarily incorporates the alleged unlawful combination which is described in paragraph 6 — and it is in this light which the profits must be viewed to test their legitimacy.

Profits may, under the appropriate facts and usual circumstances, be a legitimate objective of management. However, if the allegations of the indictment are proven, *i.e.*, if management and their negotiating agent conspired together with the union's negotiator to coerce the employees through extortion to pay Fund contributions which, pursuant to a valid collective bargining agreement, were to be paid by the employer, the profits lose their legitimate status. If, to the contrary, the defendants are able to show that valid bi-party negotiations took place resulting in the Supplementary Agreement, then the court could view increased profits as a legitimate objective. It is the alleged complicity of union and management to the detriment of the employees essentially muting their representative voice, which brings the present indictment within the purview of Hobbs, hence without the umbrella of *Enmons*. If the conspiracy took place, then there was no legitimate labor/management activity. Furthermore, Hobbs is directed at "racketeering", *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976), *i.e.*, an organized conspiracy to commit the crimes of extortion or coercion. *United States v. McGlone*, 19 F. Supp. 285, 297 (E.D. Penna. 1937). Clearly, "racketeering" and "organized crime" are difficult terms to legally define and attempts to do so could well render statutes drafted to curb their effects unconstitutional. *Cf. United States v. Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976). Convictions based on anti-racketeering statutes turn upon the behavior of the perpetrator rather than his status. *Id.* at 1018. The indictment which the court is here called upon to review alleges a factual situation wherein there was no legitimate labor activity involved. The illegitimacy of the activity itself renders the benefits to be gained, *i.e.*, increased profits, illegitimate. Hence, the court cannot view the situation here as being analagous to the factual setting in *Enmons* where there was legitimate labor activity punctuated by other illegal acts. The court is therefore convinced that the behavior alleged

here is the type of activity at which Hobbs was directed. The defendants' Motion to Dismiss is therefore denied.

As to defendant Smith's claim that he was not in a position to exercise threats of economic loss or control the distribution of unprofitable truck loads, again the Motion to Dismiss must be denied based upon the well-established rule that the acts of one conspirator, in furtherance of the conspiracy are attributable to all co-conspirators. *United States v. Cimini*, 427 F. 2d 129 (6th Cir. 1970), *cert. den.*, 400 U.S. 911 (1970); *United States v. Gomez*, 529 F.2d 412 (5th Cir., 1976); *United States v. Bernstein*, 533 F.2d 775 (2nd Cir. 1976).

Defendant Meli also moves to dismiss based on the fact that there was unauthorized persons in the grand jury room at the time the jury was either taking testimony or during its deliberations, in violation of the secrecy obligation. Rule 6(e), F.R.Crim.P. Specifically, Meli claims that the Rule was violated by the appearance of one Craig Woodhouse, an investigator of the Department of Labor. At the hearing on the Motions to Dismiss, Mr. Woodhouse was put on the witness stand and there was no testimony elicited which could lead the court to believe that he was in the grand jury room at any time other than when he appeared as a witness. Therefore, Meli's Motion to Dismiss on this ground is denied.

Motion to Dismiss Count I of the Indictment by Defendant Cusmano:

Here, Cusmano attacks two particular paragraphs of Count I. In ¶6, the indictment speaks to "... extortion ... by threats of economic loss, [i.e.], the defendants did force the drivers ... to pay the ... employer contributions to the Funds *with their consent* induced by the wrongful use of force and fear ...", whereas ¶11 alleges that the defendants caused the drivers to "... pay the company employer contributions to the Fund *without their consent*". (emphasis added). It is the defendants' position that the two averments are duplicitous

because ¶6 describes extortion while ¶11 describes robbery, both of which are defined by the Hobbs Act.

The prohibition against duplicity protects the defendant's rights under the Sixth Amendment to be apprised of the nature and cause of the accusation against him so that he may properly prepare his defense. 8 *Moore's Federal Practice* ¶8.03[1] (2d ed. 1976). It also protects against double jeopardy so that, in the event of a subsequent prosecution, the basis of the verdict in the original prosecution will be known. *Id.; United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Duplicity is not to be confused with charging the commission of a single offense by different means.

The thrust of Count I here is conspiracy. The fact that different paragraphs of the Count talk of different means of carrying out the conspiracy does not make the Count duplicitous. The conspiracy itself is the crime — not the offenses that the defendants have allegedly combined to commit. *Braverman v. United States*, 317 U.S. 49, 53-54 (1942); *United States v. Papia*, 399 F. Supp. 1381, 1387 (E.D. Wisc. 1975).

Notwithstanding the aforementioned rationale, it is the government's position that the work "without" in ¶11 is a typographical error and the phrase should actually read "with their consent". Further, the government adds that the phrase is surplusage and may be stricken from the indictment in its submission to the jury.

In both Counts and all paragraphs, save the last phrase of paragraph 11, the indictment is consistently drafted in terms of extortion. It is true that if paragraph 11 is closely read and the last phrase, "without their consent", is included, the paragraph could well imply that robbery was the means utilized to effectuate the plan of the alleged conspiracy. The court feels that the proper remedy here is to strike the phrase as surplusage in order to avoid an inconsistency and potential

confusion. Such a remedy could in no way prejudice the defendants. If anything, it simplifies their task in perparation for trial, and ultimately limits the government's proofs as to the means of effectuating the alleged plan. Accordingly, Cusmano's Motion to Dismiss is denied and the phrase "without their consent" at the conclusion of paragraph 11 will be stricken from the indictment in the submission to the jury.

Motion to Sever of Defendant Smith from All Other Defendants:

Smith moves pursuant to Rule 14, F.R.Crim.P., to sever his trial from that of all the other defendants based on the claim that to be tried with the other defendants will preclude him from calling the other defendants as witnesses on his behalf. On such a motion, the moving defendant has the difficult burden of demonstrating that he is sufficiently prejudiced to warrant severance. It is the duty of the court to exercise its discretion in weighing the interest of the public in avoiding a multiplicity of litigation against the interest of the defendant in having a fair trial. The fact onistic, though inherently prejudicial, is of itself, insufficient to merit severance. *United States v. Abrams*, 29 FRD 178 (S.D. N.Y. 1961). It is the claim of the government that, at this time, there is no *Bruton* problem. *United States v. Bruton*, 391 U.S. 123 (1968). The bald allegation that the co-defendants would be willing to testify in exculpation of the moving defendant is, of itself, insufficient to merit severance. *Cf. Braasch v. United States*, 505 F.2d 139 (7th Cir. 1974); *United States v. Abraham*, 541 F.2d 1234 (7th Cir. 1976). Accordingly, defendant Smith's motion to sever is denied without prejudice, subject to an actual showing to the court that the co-defendants will be willing to testify for him in an exculpatory fashion, or upon the arising of a *Bruton* problem.

Motion to Sever of Defendant Cusmano from All Other Defendants:

It is the position of Cusmano that he will proffer evidence that the alleged conspiracy involved solely and exclusively all of the other defendants. Such a theory, in the court's view, would pit Cusmano against the three other defendants with a mutually exclusive defense. This position would rise to a level of prejudice greater than mere hostility or conflict and, in the court's view, merits severance. *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976); *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973); *United States v. Valdez*, 262 F. Supp. 474 (D. PR 1967). Accordingly, defendant Cusmano's Motion to Sever is granted. This ruling obviates the need to consider the Motion to Sever of defendant Meli for it essentially gives him the relief for which he has prayed in his Motion to Sever.

Motion for Bill of Particulars of Defendants Meli and Cusmano:

The defendants here ask for a Bill particularizing over acts; the times, dates and places of relevant conversations in which they participated and in whose presence they were made, with the names and addresses of such persons; the names and addresses of co-conspirators who have become known to the government since the time of the indictment; a description of what they did in furtherance of the alleged conspiracy; the manner, time, place and date in which they used extortionate means to force the drivers to pay the employer contributions to the Funds; what acts, deeds or words the government will rely on to prove the allegations of Count II; and what events, facts, conduct or circumstances Count II is based upon.

The purpose of a Bill of Particulars is to effectuate the apprising requirement of the Sixth Amendment and the double jeopardy protection of the Fifth Amendment. *Wong Tai v. United States*, 273 U.S. 77, 80 (1927). Exercising its discretion, the court must seek to avoid freezing the government's proofs in advance of trial and, at the same time, protect the defendants against surprise. 8 *Moore's Federal Practice* §7.06[1](2d ed.

1976). The degree of the complexity of the case is also an ingredient for the court to take into consideration. *United States v. Onassis*, 125 F. Supp. 190 (D. D.C. 1954).

In light of the apparent complexity of this case and the length of time covered by the indictment, some 17 months, it is the position of the court that particulars should be provided in the following regard. The government is to provide all of the defendants, not merely the moving defendants, with a description of the overt acts which it intends to prove at trial. The Bill may be amended as to these particulars up until two weeks in advance of trial. Further, the government is to provide the names of any unindicted co-conspirators of whom they have knowledge and are unknown to the defendants. *See, United States v. Anderson*, 368 F. Supp. 1253 (D. Md. 1973). Accordingly, the defendants' Motions for a Bill of Particulars are granted as noted and denied in all other respects.

Motions of Defendants Meli, Smith and Cusmano for Discovery and Inspection:

Defendants Meli and Smith filed identical Motions for Discovery and Inspection. Because defendant Cusmano's discovery requests were substantially similar to several of those in the motions filed by defendants Meli and Smith, the government filed a single response. Insofar as the Motions for Discovery and Inspection are alike, this opinion applies to each defendant's requests.

Defendants demand a list of all government witnesses that the government intends to call at trial. The government has declined to furnish such a list, citing *U.S. v. Conder*, 423 F.2d 904 (6th Cir. 1970), *cert. den.*, 400 U.S. 958 (1970). In *Conder*, the court flatly stated that the names of government witnesses are not discoverable under Rule 16, F.R.Crim.P., *Id.* at 910. Accordingly, this court will not require the government to give defendants the requested witness list.

The defendants also ask for all statements made by any co-defendant. Although the government has provided defendants individually with their statements as made to the government, it declines to furnish each defendant with their co-defendants' statements. Rule 16 does not, in its terms, cover the discovery by one defendant of the statement or confession of a co-defendant. This court, therefore, will not require the production of such statements, although it will not stop cooperating co-defendants from exchanging statements.

The government has also declined to give defendants the grand jury testimony of co-defendants and of any witness who will be asked to testify at trial on the government's behalf. The well-established rule imposing the utmost secrecy on grand jury proceedings is sufficient reason for this court to deny defendants' discovery of the grand jury material they seek.

An additional reason exists for denying defendants the grand jury testimony of government witnesses. The Jencks Act, 18 U.S.C. § 3500, has been held to be the exclusive vehicle for disclosure of statements made by government witnesses, and it provides that the prosecution cannot be compelled to disclose statements of the witness before he has testified on direct examination. *U.S. v Percevault*, 490 F.2d 126 (2nd Cir. 1974). Since the 1970 Amendment to the Act, bringing grand jury testimony under the Act, pretrial discovery of grand jury testimony is also prohibited. *See* 8 *Moore's Federal Practice* ¶16.10[2] (2d ed. 1976).

The defendants have also requested pretrial discovery of all evidence in the government's possession which tends to exonerate or exculpate the defendants. Defendants state that *Brady v Maryland*, 373 U.S. 83 (1963), requires as much. The government argues that Brady imposes no *pretrial* obligation on the government. Although the *Brady* doctrine developed in the context of disclosure at trial, courts have recognized that

there exists "instances where disclosure of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense . . ." *U.S. v Cobb*, 271 F. Supp. 159, 163 (S.D. N.Y. 1967). This court, being in agreement, will order the government to provide the defendants with any *Brady* material that may exist. This directive includes the disclosure of Jencks Act type statements on the theory that the Jencks Act must accommodate the demands of due process. *U.S. v Gleason*, 265 F. Supp. 880, 887 (S.D. N.Y. 1967). Accordingly, the defendants' Motions for Discovery and Inspection are granted insofar as *Brady* material is concerned and denied in all other respects.

An appropriate order will be entered by the court.

/s/ LAWRENCE GUBOW

Lawrence Gubow
U.S. District Judge

Dated: July 18, 1977

MEMORANDUM OPINION AND ORDER DENYING MOTIONS TO DISMISS INDICTMENT
(Filed April 25, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

Criminal Action
No. 77-80488

VINCENT MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO, a/k/a Jack Russo, and ROBY G. SMITH,
Defendants.

MEMORANDUM OPINION AND ORDER DENYING MOTIONS TO DISMISS INDICTMENT

Defendants Vincent Meli, Roby G. Smith, and James A. Russo have filed similar motions to dismiss the indictment, each alleging that it fails to charge a crime under the Hobbs Act, 18 U.S.C. §1951. Identical motions were previously filed before and denied by the predecessor judge, the Honorable Lawrence Gubow. The matter proceeded to trial,* during the course of which Judge Gubow died. A mistrial was declared as to all defendants by the Chief Judge, the Honorable Cornelia G. Kennedy. Subsequently, the case was reassigned to this Judge.

Defendants then sought leave to renew their motions, alleging that they had each consented to the declaration of mistrial on the assumption that all preliminary matters could be

---

* Defendant Joseph D. Cusmano was separately tried and convicted.

renewed. Oral argument on the motions was had, at which time the decision was taken under advisement. Assuming arguendo that it is proper to reconsider the motions at this time, the Court finds for the reasons hereinafter stated that the motions should be denied.

Count I of the indictment charges that defendants Russo and Cusmano were owners of a cartage company engaged in the transportation of steel in the Eastern District of Michigan. Defendant Meli is alleged to have been an employee, agent, and labor negotiator of the company, and defendant Smith, the business agent for the Teamsters local assigned to represent the individual truck driver employees and to "protect their union contractual terms" with the cartage company.

It is alleged that at all relevant times the company was contractually bound by agreements with the International Brotherhood of Teamsters to pay employer contributions to certain welfare funds.

Count I essentially charges that the defendants *conspired* together to "obstruct, delay and affect interstate commerce" by extortion; that is, that they coerced the employees, by force and fear of economic loss, to agree to weekly deductions in their gross earnings which, in effect, made the employee drivers pay the employer's contributions to the welfare fund.

The defendants accomplished this by allegedly causing the employees to sign the Supplementary Agreement to the basic contract which authorized the company to compute the drivers' wages in such a way that a service charge of 11 percent would be deducted from their gross earnings, "thereby causing" the employee drivers to pay the company contributions to the welfare funds.

As to defendant Smith, it is alleged, as a further part of the conspiracy, that he, as business agent of the local, signed the Supplementary Agreement as agent for the drivers and

thereafter refused to act upon grievances and complaints (of the drivers) related thereto.

Count II charges defendants Meli and Russo with the substantive violation of the Hobbs Act (by extortion) and defendant Smith with aiding and abetting, 18 U.S.C. §2.

Each defendant alleges essentially that the indictment fails to state a crime under the Hobbs Act, asserting that the Hobbs Act does not apply to valid labor negotiations and that extortion cannot be defined to apply to the renegotiation of the labor contract, which allegedly produced the Supplementary Agreement.

Additionally, defendant Smith contends that the indictment fails to state a cause of action against him because, as business agent for the union, he was not in a position to be able to exercise any threat of economic loss to the employees since this decision was in the sole control of the cartage company.

Defendants rely primarily on *United States* v *Enmons*, 410 U.S. 396 (1973). In *Enmons* the Court held that the Hobbs Act was not intended to proscribe extortion "committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands." *Id.* at 399.

In holding that the Act did not reach unlawful acts of force occurring in the course of otherwise legitimate labor activity, the Court ruled that "wrongful" violence as contemplated by the statute includes only those instances in which the objective to be achieved is itself wrongful, "because the alleged extortionist has no lawful claim to that property." *Id.* at 400.

Defendants contend that *Enmons* must be read as excluding Hobbs Act coverage to the instant situation, since the commission of the extortionate acts occurred within what the defendants contend is a legitimate employer objective — that is the renegotiation of a contract necessitated by either changed economic circumstances or a desire for increased profits.

Defendants contentions, however, do not meet the allegations of the indictment which charges, in essence, a conspiracy between management, its negotiating agent, and the union's negotiator to coerce the employees through extortion to pay contributions to which the employees were entitled under a valid collective bargaining agreement.

In this Court's opinion, neither *Enmons* nor any other case cited requires the result urged by defendants.

The government contended in *Enmons* that the Hobbs Act modification of its predecessor, the Anti-Racketeering Act of 1934, 48 Stat. 979, which eliminated that Act's exception from extortionate acts, acts to secure "the payment of wages by a bona-fide employer to a bona-fide employee . . .", Sec. 2(a), had the effect of sweeping within the reach of the Hobbs Act violence occurring during a strike to achieve legitimate collective-bargaining objectives. In rejecting this contention and asserting that the amendment did not interfere in any way with the legitimate activity of labor, the Court simply reasserted the original purpose of the Anti-Racketeering Act, a purpose the Court has recently reiterated as being "to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill." *United States v Culbert*, 435 U.S. 371, 377 (1978) (italics omitted).

Thus, while *Enmons* undoubtedly reasserts the intent of both the Anti-Racketeering Statute and the Hobbs Act that it not be used as an attack on organized labor, neither it nor the cases in which it has been applied to labor activity, *see, United States v. Green*, 350 U.S. 415 (1956); *United States v. Billingsley*, 474 F.2d 63 (6th Cir. 1973), *cert. denied*, 414 U.S. 819 (1973), support defendants' contention that Hobbs is misapplied whenever an employer simply asserts an economic or profit motive for its allegedly illegitimate activities. Indeed, the broad purpose of the Act was to preclude "all illegal activities

within the scope of the Act, whether labor or non-labor." *United States v. Yokley*, 542 F.2d 300, 303 (6th Cir. 1976).

The activity which the indictment charges, that is, a conspiracy between management and the union's negotiator to extort, by threat of economic loss, property to which the emloyees were lawfully entitled is wrongful. If the conspiracy took place as the government alleges, then there was not legitimate labor-management activity.

Had the government here charged extortionate activity by the employer in the course of the legitimate renegotiation of a contract, a situation arguably more akin to the *Enmons* rationale would be presented. However, in the factual context of an extant contractual right to which the employees were entitled, defendants' assertion of a legitimate economic purpose, higher profits, does not convert the allegations into an *Enmons* situation. The alleged activities of the employer are more analogous to cases in which Hobbs Act prosecutions have been upheld, such as where union members sought by extortion to obtain wages for superfluous or fictitious services. *See, e.g., United States v. Green*, *supra*; *United States v. Billingsley*, *supra*. As the court noted in *Enmons*, in such situations the Hobbs Act applies because the extortionate conduct is also "wrongful," that is, "the employer's property has been misappropriated." *Enmons*, *supra* at 400.

The indictment here alleges conspiracy to misappropriate employee property by extortionate means and therefore states an offense under the Hobbs Act.

Accordingly, the motions to dismiss must be and hereby are DENIED.

Defendant Smith's additional contention that the indictment must be dismissed because he was not in a position to exercise threats of economic loss must also be DENIED, based

upon the established rule that the acts of one conspirator in furtherance of the conspiracy are attributable to all. *United States v. Cimini*, 427 F.2d 129 (6th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

IT IS SO ORDERED.

/s/ PATRICIA J. BOYLE

PATRICIA J. BOYLE
United States District Judge

Dated: April 24, 1979
Detroit, Michigan

APPENDIX G

JUDGMENT AND ORDER
OF COMMITMENT

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
Plaintiff,

vs.

Docket No.
77-80488

JAMES A. RUSSO
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 01/23/80

COUNSEL:

WITH COUNSEL RICHARD LUSTIG

FINDING & JUDGMENT:

There being a finding/verdict of GUILTY AS TO COUNT I AND II OF THE INDICTMENT

Defendant has been convicted as charged of the offense(s) of

Conspiracy to violate the Hobbs Act, charged in Count I of the Indictment; in violation of Section 1951, T. 18 U.S.C.

Aiding and abetting and violation of the Hobbs Act by extortion, as charged in Count II of the Indictment; in violation of Section 1951 and 2, T. 18 U.S.C.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER:

Three (3) years as to each Count. Said sentence to run concurrently.

IT IS FURTHER ORDERED that the defendant pay a fine to the Clerk of the Court, for the use and benefit of the United States, in the amount of ten thousand dollars ($10,000.00) as to each Count, a total of twenty thousand dollars ($20,000.00).

SPECIAL CONDITIONS OF PROBATION:

IT IS FURTHER ORDERED that the appearance bond of said defendant stand as bond on pending an appeal of this conviction.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of

five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ PATRICIA J. DOYLE

PATRICIA J. DOYLE

Dated: _____

JUDGMENT AND ORDER
OF COMMITMENT

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
Plaintiff,

vs.

VINCENT MELI
Defendant.

Docket No.
77-80488

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 01/23/80

COUNSEL:

WITH COUNSEL WILLIAM J. WEINSTEIN

FINDING & JUDGMENT:

There being a finding/verdict of GUILTY AS TO COUNT I AND II OF THE INDICTMENT

Defendant has been convicted as charged of the offense(s) of

Conspiracy to violate the Hobbs Act, as charged in Count I of the Indictment; in violation of Section 1951, T. 18 U.S.C. Aiding and abetting and violation of the Hobbs Act by extortion, as charged in Count II of the Indictment; in violation of Section 2 and 1951, T. 18 U.S.C.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no suffi-

cient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER:

Three (3) years as to each Count, said sentence to run concurrently.

IT IS FURTHER ORDERED that the defendant pay a committed fine to the Clerk of the Court, for the use and benefit of the United States, in the amount of ten thousand dollars ($10,000.00) as to each Count, a total of twenty thousand dollars ($20,000.00).

SPECIAL CONDITIONS OF PROBATION:

IT IS FURTHER ORDERED that the appearance bond of said defendant stand as bond pending an appeal of this conviction.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ PATRICIA J. DOYLE

PATRICIA J. DOYLE

Dated: _____

JUDGMENT AND ORDER
OF COMMITMENT

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
Plaintiff,

vs.

ROBY G. SMITH
Defendant.

Docket No.
77-80488

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 01/23/80

COUNSEL:

WITH COUNSEL EDWARD SANDERS

FINDING & JUDGMENT:

There being a finding/verdict of GUILTY AS TO COUNT I AND II OF THE INDICTMENT

Defendant has been convicted as charged of the offense(s) of

Conspiracy to violate the Hobbs Act, as charged in Count I of the Indictment; in violation of Section 1951, T. 18 U.S.C. Aiding and abetting and violation of the Hobbs Act by extortion, as charged in Count II of the Indictment; in violation of Section 2 and 1951, T. 18 U.S.C.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no suffi-

cient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER:

Three (3) years as to each Count, said sentence to run concurrently.

IT IS FURTHER ORDERED that the defendant pay a fine to the Clerk of the Court, for the use and benefit of the United States, in the amount of five thousand dollars ($5,000.00) as to each Count, a total of ten thousand dollars ($10,000.00).

SPECIAL CONDITIONS OF PROBATION:

IT IS FURTHER ORDERED that the appearance bond of said defendant stand as bond pending an appeal of this conviction.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ PATRICIA J. DOYLE

PATRICIA J. DOYLE

Dated: _____

No. 83-368

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES A. RUSSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
VINCENT L. GAMBALE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a conspiracy between labor and management to reduce employees' wages through threats of economic loss made wholly outside the collective bargaining process may constitute a violation of the Hobbs Act, 18 U.S.C. 1951.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-368

JAMES A. RUSSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A40) is reported at 708 F.2d 209. The opinions of the district court (Pet. App. A50-A60, A61-A66) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. A petition for rehearing was denied on July 25, 1983 (Pet. App. A41-A42). The petition for a writ of certiorari was filed on September 3,

1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of violating, and conspiring to violate, the Hobbs Act, 18 U.S.C. 1951.[1] Each petitioner was sentenced to three years' imprisonment. In addition, petitioners Meli and Russo were fined $20,000 each, and petitioner Smith was fined $10,000. The court of appeals affirmed (Pet. App. A4-A40).

The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A6-A9). It showed that petitioner Russo was the vice-president and treasurer of the J & J Cartage Company ("J & J") and owned 50% of the company's stock,[2] that petitioner Meli was J & J's labor "negotiator," and that petitioner Smith was a business agent of Local 299 of the International Brotherhood of Teamsters, which, at the times pertinent to this case, represented J & J's employees (*id.* at A6-A7). J & J employed approximately 40 truck drivers to haul steel from the Detroit waterfront to plants and warehouses in the Detroit area.

---

[1] Petitioners were convicted at a second trial after their first trial ended in a mistrial due to the death of the presiding judge (Pet. App. A9). Joseph Cusmano, who was indicted along with petitioners, was convicted at a separate trial. Cusmano's conviction was reversed on the ground that the indictment was constructively amended at his trial. *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981) (see Pet. App. A6 n.3 & A10-A11).

[2] Co-defendant Cusmano owned the other 50% of J & J's stock (Pet. App. A6 n.3).

Pursuant to collective bargaining agreements between J & J and Local 299, J & J was required to pay drivers who owned their own tractors and trailers ("owner-operators") at least 75% of the gross amount paid to the company for loads of steel hauled. The collective bargaining agreements also required J & J to contribute to the union's health and welfare fund and pension plan. A special rider to the agreements made it "unlawful and illegal" for the company's contributions to be deducted from the drivers' gross earnings. *Id.* at A7-A8.

In late 1971, Local 299 appointed two business agents, James Morisette and Donnes Deters, to investigate the status of drivers employed by cartage companies, including J & J, and to enforce the union membership and employer contribution provisions of the existing collective bargaining agreements. Through the efforts of these men, non-union drivers employed by J & J were added to the union rolls. C.A. App. 186a-193a, 737a-740a; 9 Tr. 235-242, 26 Tr. 168-171. Thereafter, in the spring of 1972, petitioner Meli, who previously had not been involved with J & J, met with Morisette and Deters and advised them that the principals of J & J were friends of his and that J & J should not be "unduly harassed" by the union. A short time later, Morisette and Deters were relieved of their duties, and petitioner Smith replaced them as the business agent for Local 299 at J & J. At about the same time, petitioner Meli was hired as J & J's labor negotiator. C.A. App. 133a-138a, 191a, 194a-198a; 4 Tr. 91-96, 9 Tr. 240, 249-253.

In late 1972, a drivers' "Grievance Committee" prepared a list of several ways in which they thought that J & J's drivers were being mistreated. The list

was given to J & J and petitioner Smith. Among other things, the drivers asked that J & J pay Social Security taxes and make contributions to the union's health and welfare fund and pension plan as required under the collective bargaining agreements. Pet. App. A8.

In response to the drivers' grievances, J & J held a general meeting of the drivers on November 26, 1972. At that meeting, petitioners Russo and Meli proposed that 15% be deducted from the drivers' gross earnings to cover the cost of their demands, but that proposal was voted down. At a second general meeting held several months later, J & J proposed to the drivers that the company would meet its obligations under the collective bargaining agreements in return for an 11% "service charge" to be deducted from the drivers' gross earnings.[3] The drivers overwhelmingly rejected this proposal as well. Pet. App. A8.[4]

Having failed to obtain the drivers' agreement to either proposal, co-defendant Cusmano called each of the drivers into his office individually and, "through promises, threats of economic loss, and misrepresentation," procured their signatures on a "supplementary agreement" providing for a 11% "serv-

---

[3] Even before proposing the 11% "service charge" to the drivers, co-defendant Cusmano had told one employee that the drivers would continue to pay their own health and welfare and pension contributions "one way or the other" (C.A. App. 402a; 17 Tr. 9). In addition, over a month before the drivers voted to reject the 11% proposal, J & J had ordered, received, and paid for pre-printed lease agreement forms that incorporated the 11% "service charge" (C.A. App. 122a-124a, 1408a-1409a; 4 Tr. 40-42).

[4] A few drivers who earlier had been threatened with dismissal by co-defendant Cusmano voted for the 11% "service charge" proposal (C.A. App. 601a-603a; 23 Tr. 61-63).

ice charge" to be deducted from their gross earnings (Pet. App. A9).[5] Petitioner Meli had a reputation as being a part of the Mafia, and there was testimony at trial that this also was a factor in procuring the drivers' acquiescence to the 11% agreement (*ibid.*). Petitioner Smith cooperated with J & J by approving the supplementary agreement on behalf of Local 299 even though it directly contradicted the existing collective bargaining contracts. Moreover, Smith failed to follow the normal practice of filing the agreement with the Local and also failed to process the drivers' many grievances. Pet. App. A9; C.A. App. 167a-179a, 180a-182a; 6 Tr. 41-44, 7 Tr. 43-51, 94-96.[6] The

[5] Petitioners employed a variety of economic threats to persuade the drivers to sign the "supplementary agreement." Some drivers signed out of fear of reprisal through "spanking" by the company. J & J controlled the dispatching of drivers to the various loads it had contracted to haul, and some of these loads, because of the kind or quantity of steel involved or the time required to load or unload the steel, were unprofitable for drivers. Many of the drivers testified that a driver with whom the company was unhappy would be punished, or "spanked," by being given a disproportionate number of these "bad loads" or "dead loads." C.A. App. 225a, 348a-351a, 421a-422a, 572a, 609a, 709a, 734a-736a; 11 Tr. 30, 13 Tr. 244-247, 17 Tr. 65-66, 21 Tr. 108, 23 Tr. 75, 25 Tr. 55, 26 Tr. 70-72. Other drivers signed because they feared losing their jobs, and still others, who were buying their trucks from J & J (and whose trucks were titled in J & J's name), feared losing the money they had invested in the equipment. C.A. App. 497a-501a, 578a-581a, 582a-590a, 605a-606a, 622a-626a, 721a-723a, 726a-727a; 18 Tr. 111-115, 21 Tr. 157-160, 193-197, 23 Tr. 71-72, 179-183, 25 Tr. 232-234, 261-262.

[6] For example, driver Canter filed a grievance with Local 299 over the 11% deduction (C.A. App. 606-611a, 1438a; 23 Tr. 72-77). The grievance report, signed by petitioner Smith, indicates that a meeting was held at the company on December 19, 1973, and that the driver was absent and unavail-

11% "service charge" was deducted from the drivers' earnings for approximately a year; the deductions stopped shortly after a news reporter interviewed the president of Local 299 concerning alleged improprieties at J & J (C.A. App. 506a, 747a-752a; 26 Tr. 149, 189-192).

2. Prior to trial, petitioners moved to dismiss the indictment, alleging that it failed to state a crime under the Hobbs Act. Relying principally on *United States* v. *Enmons*, 410 U.S. 396 (1973), petitioners argued that Congress did not intend the Act to apply to "valid labor negotiations" and that the facts alleged in the indictment concerned the "legitimate renegotiation of an existing contract, necessitated by failing economic conditions or prompted by a desire for increased profits" (Pet. App. A51). Judge Gubow, to whom the case was then assigned, denied the motion. He reasoned that the facts alleged in the indictment revealed the absence of a legitimate management objective (Pet. App. A53):

> [I]f management and their negotiating agent conspired together with the union's negotiator to coerce the employees through extortion to pay Fund contributions which, pursuant to a valid collective bargaining agreement, were to be paid by the employer, the profits lose their legitimate status. * * * It is the alleged complicity of union and management to the detriment of the employees essentially muting their representative voice, which brings the present indictment within the purview of Hobbs, hence without the umbrella of *Enmons*. * * * The indictment which the court is here called upon to review alleges a

---

able (C.A. App. 616a-618a; 23 Tr. 90-92). In fact, the driver had not been invited to the meeting (C.A. App. 612a; 23 Tr. 86). No further action was taken on the grievance.

> factual situation wherein there was no legitimate labor activity involved. The illegitimacy of the activity itself renders the benefits to be gained, *i.e.*, increased profits, illegitimate.

Following Judge Gubow's death, the case was reassigned to Judge Boyle. She allowed petitioners to renew their motion to dismiss the indictment but reached the same conclusion as had Judge Gubow (Pet. App. A65):

> The activity which the indictment charges, that is, a conspiracy between management and the union's negotiator to extort, by threat of economic loss, property to which the employees were lawfully entitled[,] is wrongful. If the conspiracy took place as the government alleges, then there was not legitimate labor-management activity.

3. The court of appeals affirmed (Pet. App. A4-A40). In the opinion for the court, Judge Brown noted that the 11% "service charge" was not achieved through collective bargaining; instead, it came about as a result of pressure exerted on the drivers individually (*id.* at A16). Under these circumstances, the court concluded that (*ibid.*):

> As we see it, the situation for purposes of the applicability of the Hobbs Act would not have been different had the drivers, as a result of threats of economic loss, been forced to take money out of their pockets and pay it to the Company to be used to satisfy the Company's legal obligation to the pension and welfare funds.

Judge Martin, who had authored the opinion in *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981) (see page 2 note 1, *supra*), wrote a special

concurrence in which he noted that the panel in *Cusmano* had implicitly considered the issue raised by petitioners here and resolved it in the government's favor (Pet. App. A18). He also observed that the factor distinguishing both *Cusmano* and the present case from *Enmons* was petitioners' objective (*ibid.*):

> Here the employer, outside the collective bargaining context, attempted to obtain [by] wrongful means and under the guise of a "service charge" an objective which the parties' own contract specified would be "unlawful and illegal"—the shifting of responsibility for welfare and pension fund payments to the employees. It seems to me that under these circumstances *Enmons* is no bar to application of the [Hobbs] Act.

Finally, District Judge Holschuh, sitting by designation, wrote an opinion concurring only in the result, which he believed was compelled by the court of appeals' earlier decision in *Cusmano* (Pet. App. A20). In Judge Holschuh's view, however, the majority had wrongly interpreted the Hobbs Act as covering the activity alleged in the indictment, which he characterized as "an attempt by management to reduce its labor costs through a modification of a collective bargaining agreement" (*id.* at A29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with this Court's decision in *Enmons* or with the decision of any other court. Accordingly, further review by this Court is unwarranted.

1. Petitioners argue (Pet. 7-11) that their conduct did not violate the Hobbs Act because their goal—to reduce J & J's labor costs and hence increase

company profits through a "mid-term modification" of the collective bargaining agreements—constituted a "legitimate management objective." In support of this contention, petitioners rely on *Enmons*, in which this Court held that union members' use of wrongful means—strike violence—to achieve a legitimate labor objective—higher wages as compensation for their work—does not violate the Hobbs Act. The Court explained in *Enmons* that the term "wrongful" as used in the Hobbs Act's definition of extortion (18 U.S.C. 1951(b)(2)) "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property" (410 U.S. at 400).

In the present case, the court of appeals correctly concluded that petitioners' conduct was not directed at a legitimate objective within the meaning of *Enmons* (Pet. App. A16):

> In the instant case, the Company * * * had no legitimate claim to the "service charge" of 11% of the gross revenues. This is true because the existing contracts expressly required the Company to make the payments to the welfare and pension funds out of the Company's own funds. Indeed, the contract provided that it would be "unlawful and illegal" to deduct the welfare and pension payments from the owner-operator's gross earnings.

Enmons left undisturbed the application of the Hobbs Act to instances in which "unions used the proscribed means to exact 'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitous services' of workers" (410 U.S. at 400; footnote omitted). See, *e.g.*, *United States* v. *Green*,

350 U.S. 415 (1956); *United States* v. *Wilford*, 710 F.2d 439 (8th Cir. 1983), petition for cert. pending, No. 83-496; *United States* v. *Billingsley*, 474 F.2d 63 (6th Cir.), cert. denied, 414 U.S. 819 (1973). In those cases, as in the one at bar, the extortionate conduct was "wrongful" because it resulted in "property [being] misappropriated" (*Enmons*, 410 U.S. at 400). There is no rational distinction between forcing employers to pay for unwanted or fictitous services and forcing employees to forego the wages to which they are contractually entitled for work actually performed at the request of the employer; the two situations are simply opposite sides of the same illegal coin. Accordingly, *Enmons* does not support petitioners' argument.

2. In any event, *Enmons* has never been extended to situations falling outside of customary labor-management relations. The Court in *Enmons* relied heavily on legislative history of the Hobbs Act revealing a congressional intent to avoid policing the conduct of *strikes* (410 U.S. at 401-408, 411). Accordingly, *Enmons* has been accurately described as "a labor case dealing with the unique problem of strike violence," *United States* v. *Porcaro*, 648 F.2d 753, 760 (1st Cir. 1981), and, as the court below observed, limited to conduct in furtherance of "legitimate *labor* objectives" (Pet. App. A17; emphasis in original). See also *United States* v. *Zappola*, 677 F.2d 264, 269 (2d Cir. 1982), cert. denied, No. 82-297 (Oct. 4, 1982); *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976) (*Enmons* limited to "use of coercive tactics to obtain increased wages" in pursuit of "legitimate labor objectives").

Petitioners' attempt to characterize this case as an ordinary "labor case" is unavailing. Contrary to petitioners' claim (Pet. 11), their extortionate conduct was completely unrelated to "Collective Bargaining session[s]." Indeed, after petitioners were unsuccessful at general meetings in exacting the proposed "service charge" from J & J's employees, they eschewed collective bargaining altogether and resorted to threatening employees on an individual basis. As the court below noted (Pet. App. A16), the so-called "supplementary agreement" to shift the burden of making contributions to the union health and welfare fund and pension plan to the drivers "did not result from collective bargaining," but rather from a conspiracy between petitioners Russo and Meli and petitioner Smith, the union's own representative, to "pressure" individual drivers to accede to the company's "service charge" proposal. Thus, even if it were true, as petitioners argue (Pet. 10), that there is nothing wrong with management's seeking a "mid-term modification" of a collective bargaining agreement,[7] that would hardly legitimize the conspiracy in this case between management and the union's representative to force individual employees, completely outside the collective bargaining context, to relinquish earnings to which they were plainly entitled under the union contract.[8]

---

[7] In his concurring opinion, Judge Holschuh acknowledged (Pet. App. A30) that the means employed by petitioners to "modify" the union contract "without question" constituted an unfair labor practice under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d).

[8] Petitioners' argument (Pet. 11) that the decision below raises the spectre that "every businessman in this Country could find himself accused of extortion in violation of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

NOVEMBER 1983

Hobbs Act after any union bargaining session" is plainly refuted by the fact that the extortionate conduct in this case involved a conspiracy between management and the union's representative and took place completely outside the collective bargaining context.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 424883 133